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No. _____

In The

Supreme Court of the United States

October Term, 1994

ADULT VIDEO ASSOCIATION, a California corporation, DOE, INC., a California corporation, ROE, INC., a Utah corporation and PAUL POE,

Petitioners,

vs.

JANET RENO, in her official capacity only as Attorney General of the United States,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Given that the Government has already used the post-trial forfeiture provisions of 18 U.S.C. § 1963 (the criminal RICO forfeiture statute) to deliberately censor and eliminate vast quantities of non-obscene constitutionally-protected erotic expression to which it is hostile, and given that it has now repeatedly used forfeiture penalties in a variety of other statutory contexts (all of which have in common a pattern whereby the Government seeks massive forfeitures of *non*-obscene constitutionally-protected sexually-oriented materials and the businesses which sell or distribute them by selectively prosecuting as obscene a select few items constituting the worst of those materials), should this Court revisit its novel opinion in *Alexander v. United States*, ___ U.S. ___, 113 S.Ct. 2766 (1993), which, essentially, held that there are no First Amendment limits whatsoever on RICO post-trial forfeitures in these types of cases?

2) Does this Court's opinion in *Alexander* conflict with its opinion in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), to the extent *Arcara* recognized a First Amendment problem if the closure of a bookstore was based *exclusively* on illegal *expressive* activity, whereas *Alexander* found no First Amendment problem where there was a mass forfeiture of 10 bookstores, and hundreds of thousands of presumptively-protected books, magazines and videotapes were forfeited and destroyed based exclusively on a few incidents of prior illegal expressive activity?

3) Given that the express purpose of RICO forfeiture is to *utterly disable and destroy* any business

QUESTIONS PRESENTED – Continued

engaged in "racketeering activity", and given that Congress has defined "racketeering activity" to include offenses as minor as the sale of two copies of a magazine or film which a jury – applying inevitably obscure standards – later concludes is obscene, to the extent that 18 U.S.C. § 1963 allows forfeiture of items which are themselves neither obscene nor the proceeds from sale of obscene materials, do such broad forfeitures violate the First Amendment as a prior restraint upon presumptively protected expression?

4) Did this Court's decision in *Alexander*, which essentially ignored any analysis of the actual *effect* of RICO's criminal forfeiture statutes on protected expression, misapply a multitude of this Court's prior decisions holding that prior restraints must not be analyzed based upon their *form*, but rather, by their *effect*?

5) Is this Court's opinion in *Alexander* irreconcilable with its opinion in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), to the extent that the *Alexander* opinion purports to limit prior restraints to *judicial or administrative orders* which formally ban future expression, in contrast to the informal prosecutorial threats held to be prior restraints in *Bantam Books*? For the same reason, is *Alexander* inconsistent with this Court's decisions condemning, as prior restraints, search warrants which authorize mass seizures, even though those warrants do not expressly forbid any future expressive activities? Do these discrepancies not require this Court to reconsider whether prior restraints should be determined by their *effect* rather than their *form*?

QUESTIONS PRESENTED – Continued

6) To the extent this Court's decision in *Alexander* found no unconstitutional chilling effect in obscenity-predicated RICO forfeitures, notwithstanding the inherent vagueness of obscenity laws, the very lax scienter standard allowed under *Hamling v. United States*, 418 U.S. 87 (1974), and the enormously destructive penalties authorized by blanket RICO forfeitures, did its *Alexander* opinion conflict with its opinions in *Smith v. California*, 361 U.S. 147 (1959), and *New York Times v. Sullivan*, 376 U.S. 254 (1964), to the extent that those cases, viewed together, stand for the proposition that a law restricting speech may be invalidated due to its chilling effect based upon a comparison of three factors: (1) the relative strength or laxness of any scienter standard; (2) the extent to which the statute's prohibitory language is clear or relatively obscure; and (3) the amount of penalty or punishment the law authorizes if its provisions are violated.

7) Does this Court's opinion in *Alexander* conflict with its recent decision in *Ladue v. Gilleo*, ___ U.S. ___, 114 S.Ct. 2038, 2045, n.13 (1994), wherein this Court held that "the First Amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression"?

8) Given that the Attorney General's Commission on Pornography expressly advocated the use of RICO and similar state statutes to "eliminate" pornography businesses, even though non-obscene pornography is entirely protected by the

QUESTIONS PRESENTED – Continued

First Amendment, does the Government's intentional use of RICO and other forfeiture statutes for the very real purpose of censoring and banning massive amounts of constitutionally *protected* expression towards which it is hostile, require reevaluation of the correctness of the *Alexander* decision?

LIST OF PARTIES

All parties of record before the Ninth Circuit Court of Appeals are set forth in the caption of this petition.

There are two corporate petitioners herein. They appear under the fictitious names of Doe, Inc. and Roe, Inc. in order to preserve their anonymity. They fear that if their true identities were divulged, they would face an increased likelihood of an obscenity-predicated federal RICO prosecution. To the knowledge of undersigned counsel, neither of these two corporations has any parent companies nor any subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The district court's unreported order partially granting the Government's motion to dismiss is reproduced as Appendix A. The district court's final judgment, dated January 25, 1990, appears as Appendix B. The Court of Appeals' initial opinion herein (as amended) is reported as *Adult Video Association v. Barr*, 960 F.2d 781 (9th Cir. 1992), and appears as Appendix C. The Court of Appeals' unreported orders denying rehearing and rehearing en banc dated June 15, 1992 and July 7, 1992, following its initial opinion, appear as Appendix D. This Court's order granting *certiorari*, and vacating and remanding to the Ninth Circuit, is published at ___ U.S. ___, 113 S.Ct. 3028

(1993) and appears as Appendix E. The opinion of the Court of Appeals on remand from this Court is reported as *Adult Video Association v. Reno*, 41 F.3d 503 (9th Cir. 1994), and appears as Appendix F.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on remand from this Court on November 30, 1994. This petition seeks review of that opinion. On February 27, 1995, Justice O'Connor, as Circuit Justice, issued an order extending the time to and including March 30, 1995, for the filing of this petition. On March 17, 1995, Justice O'Connor issued an order further extending such deadline to April 11, 1995. The petition having been timely filed, this Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

UNITED STATES CODE

18 U.S.C.A. § 1465 (West Supp. 1995)

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound

or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both."

18 U.S.C.A. § 1961 (West Supp. 1995)

"As used in this chapter –

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . sections 1461-1465 (relating to obscene matter) . . . ."

18 U.S.C.A. § 1963 (West Supp. 1995)

"(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years . . . , or both, and shall forfeit to the United States, irrespective of any provision of State law –

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any –

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection . . . ."

STATEMENT OF THE CASE

Petitioner Adult Video Association (A.V.A.) is a non-profit association incorporated under the laws of the state of California with its residence and principal place of business in the Central District of California. Its members include individuals and corporations involved in the manufacture and distribution of constitutionally-protected sexually-oriented videotapes and related businesses. The other petitioners are a producer, a distributor, a retailer and a consumer of sexually explicit videotapes. Because of the severely chilling impact which the existence of obscenity-predicated RICO forfeiture has on them and/or on those with whom they deal, petitioners filed an action seeking, *inter alia*, a declaratory judgment that RICO's post-trial criminal forfeiture provisions (contained in 18 U.S.C. § 1963) are facially unconstitutional when predicated solely on adult obscenity offenses. They filed an Amended Complaint on January 21, 1988.

Allegations of the First Amended Complaint

The RICO post-trial criminal forfeiture provisions place the members of the A.V.A. and all petitioners other than Poe in a completely untenable posture. Under the First Amendment, A.V.A. members have a right to manufacture and distribute constitutionally-protected, non-obscene sexually-oriented videotapes, and the adult public has a concomitant right to freely purchase, rent or otherwise view such materials. Indeed, in 1986, there were over 104 million rentals of sexually-oriented videotapes to consenting adults throughout this Country.

While A.V.A. members manufacture and/or distribute sexually-oriented videotapes which they believe to be constitutionally-protected, they *cannot* know *in advance* whether particular videotapes might subject them to obscenity prosecutions. The Government provides advance notice neither as to which materials are or are not protected nor as to which materials its officials *believe*

to be protected. Moreover, merely because such videotapes contain explicit depictions of sexual acts does not resolve whether any one videotape is legally obscene. Rather, the distributor of such materials can only look to the amorphous test for obscenity established in *Miller v. California*, 413 U.S. 15 (1973), and try to guess whether particular materials fall within the three-part test established by that case, including the use of community standards.

While the express goal of *Miller's* use of "community standards" was to permit levels of tolerance of sexually-oriented expression to be set by individual communities, the practical result has been total unpredictability as to whether *any* sexually-oriented expression will be found obscene or constitutionally-protected in any jurisdiction throughout the entire country. Worse yet, there is no statutory procedure whereby a national distributor of sexually-oriented materials can obtain an advance, binding determination that particular sexually-oriented materials are entitled to nationwide constitutional protection.

Because of the utter inability of any nationwide distributor of sexually-oriented materials to obtain a pre-distribution determination that any such presumptively-protected materials are in fact not constitutionally-protected, the potential possibility of prosecution under traditional federal obscenity laws is a constant threat to those wishing to provide the adult public with constitutionally-protected non-obscene sexually-oriented videotapes. As a result of this constant threat, the hazards attendant to this endeavor (and the chilling effect occasioned thereby) have increased so enormously that they will result in such self-censorship that the American public will no longer be able to purchase or rent *any* constitutionally-protected non-obscene sexually-oriented videotapes. A.V.A. members believe that the RICO post-trial criminal forfeiture provisions simply exact too high a price and too great a chilling effect to be consistent with the First Amendment's guarantee of freedom of expression.

Petitioner Doe, Inc., is a California corporation which brings this challenge under a fictitious name because it fears that revelation of its identity will increase the likelihood that it will be prosecuted and subjected to the post-trial criminal forfeiture provisions of 18 U.S.C. § 1963. Petitioner Doe, Inc., resides and has its principal place of business in the Central District of California and is a nationwide distributor of constitutionally-protected sexually-oriented videotapes. It similarly fears prosecution and restraint under the RICO provisions challenged here.

Petitioner Roe, Inc., is a Utah corporation which operates a retail video store in Salt Lake City and brings this challenge under a fictitious name because it also fears that revelation of its identity will increase the likelihood that it will be prosecuted and restrained under the provisions challenged herein. Roe, Inc. is particularly affected by the "community standards" of the *Miller* test given the local climate in Utah.

Because of the lack of any way to determine in advance what material is or is not obscene, the extremely severe sanctions of RICO's post-trial forfeiture provisions, and the inherent vagueness of the obscenity statutes, petitioner Roe, Inc. decided that it could not risk the sale or rental of *any* sexually-explicit videotapes, even though such tapes might contain only those depictions of sexual activities which the average person would find appeal to a normal, healthy interest in sex (*non-prurient* expression under this Court's holding in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985)), and even though those tapes might contain no depictions of sexual activity that the average citizen would find patently offensive when such videotapes are distributed exclusively to consenting adults.

Paul Poe is the fictitious name of an attorney admitted to the Utah bar who is a resident of Salt Lake City, Utah. Petitioner Poe brings this challenge under a fictitious name because he fears that revelation of his identity in this suit could cause serious damage to his reputation within the Salt Lake legal and business community and

also could expose him to potential acts of vandalism, assault or other forms of intimidation by persons in his community who are adamantly opposed to the distribution of constitutionally-protected materials which are sexually-explicit.

Petitioner Poe desires to rent for private home viewing constitutionally-protected, but sexually-explicit videotapes depicting normal sexual activities between consenting adults, but has been unable to find such videotapes for rental in his community. Poe believes that the chilling impact of possible RICO forfeitures accounts for the unavailability of such videotapes in his community. Therefore, Poe challenges the post-trial criminal forfeiture provisions of 18 U.S.C. § 1963 as interfering with his First Amendment right to receive constitutionally-protected materials.

Proceedings Below

Judge Ronald S.W. Lew of the United States District Court for the Central District of California granted the Government's motion to dismiss with respect to petitioners' First Amendment challenge to RICO's post-trial criminal forfeiture provisions and petitioners appealed.[1]

In its initial opinion herein (Appendix C), the United States Court of Appeals for the Ninth Circuit held that 18 U.S.C. § 1963 is unconstitutional to the extent it authorizes post-trial obscenity-predicated forfeiture where that which is forfeited is "those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity". *Adult Video Association v. Barr*, 960 F.2d 781, 791 (9th Cir. 1992).

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[1] The District Court dismissed this aspect of petitioners' complaint in an order dated August 18, 1989, which is set forth herein as Appendix A. On January 29, 1990, the District Court entered its final judgment, disposing of all remaining aspects of the complaint (Appendix B). It is from that latter judgment that petitioners appealed.

However, the Government then petitioned this Court for a writ of certiorari, which petition was granted, *Reno v. Adult Video Association*, ___ U.S. ___, 113 S.Ct. 3028 (1993). This Court then vacated the Ninth Circuit's original opinion and remanded to the Ninth Circuit for further consideration in light of its holding in *Alexander v. United States*, ___ U.S. ___, 113 S.Ct. 2766 (1993), that forfeiture of all a defendant's assets involved in a legitimate expressive business following conviction for even relatively few obscenity offenses in violation of RICO did not violate the First Amendment as an unconstitutional prior restraint.

On remand, the Ninth Circuit held (Appendix F), in light of *Alexander v. United States, supra*, that RICO's post-trial forfeiture provisions do *not* constitute an unconstitutional prior restraint, even when applied to destroy massive quantities of non-obscene books and videotapes, and to seize all assets, inventory and all other property invested in legitimate expressive activity. *Adult Video Association v. Reno*, 41 F.3d 503 (9th Cir. 1994).

Petitioners now seek certiorari for review of the Ninth Circuit's revised opinion. Specifically, petitioners challenge the holding that mass forfeitures of constitutionally-protected media materials, as well as of all other assets which are invested in a legitimate expressive business and which are uninvolved or only marginally involved in the sale of obscenity, does not violate the First Amendment.

REASONS FOR GRANTING THE WRIT

I. THE GOVERNMENT'S EXPANDING USE OF FORFEITURE STATUTES FOR ELIMINATING ENORMOUS QUANTITIES OF NON-OBSCENE EROTIC EXPRESSION TO WHICH IT IS HOSTILE REQUIRES THIS COURT TO REEXAMINE WHETHER THE FEDERAL RICO STATUTES ARE BEING USED AS TOOLS OF DIRECT CENSORSHIP.

In *Alexander v. United States*, ___ U.S. ___, 113 S.Ct 2766 (1993), a narrow majority of this Court upheld,

against a First Amendment challenge, the permanent forfeiture of ten separate book stores and video stores, all of their real and personal property, fixtures and bank accounts, as well as the mass seizure and then destruction of hundreds of thousands of presumptively protected magazines and videotapes found in those stores, solely because a jury concluded that seven out of thirteen different titles of videotapes and magazines named in an indictment were legally obscene. This drastic forfeiture was authorized and conducted pursuant to 18 U.S.C. § 1963, RICO's criminal forfeiture statute.

In *Alexander*, the *only* RICO predicate offenses involved *expression*,[2] *i.e.*, the obscenity convictions based on the seven titles which were found obscene at trial. Moreover, the destruction of the stores' massive inventories of undoubtedly protected magazines and videotapes presumably included all copies of even the six titles which the jury concluded were *not* obscene. Because the Government surely selected for prosecution those few titles which it believed were most likely to result in an obscenity conviction,[3] the acquittal of nearly half the titles prosecuted in that case strongly suggests that the overwhelming majority of the hundreds of thousands of unlitigated magazines and videotapes that were seized and destroyed, were, in all likelihood constitutionally-protected, albeit of a sexually explicit nature.

The practical impact of the Government's forfeiture and destruction in *Alexander* was the elimination of the overwhelming majority of outlets for constitutionally-

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[2] The *Alexander* opinion expressly acknowledged that obscenity offenses involve expression (113 S.Ct. at 2775), citing its prior statement to that effect in *R.A.V. v. St. Paul*, 505 U.S. ___, ___, 112 S.Ct. 2538, 2543 (1992).

[3] While the Government's deliberate selection of the most prosecutable titles for inclusion in the *Alexander* indictment is prosecutorially understandable, its deliberate choice to do so was not reflected in this Court's opinion. However, as counsel for *Alexander*, undersigned counsel had the opportunity to review the trial court transcript in that case and can verify that this is in fact what occurred.

protected sexually-oriented expression in the Twin Cities area. As characterized by Justice Kennedy in his dissenting opinion in that case: "This is restraint in more than theory. It is censorship all too real." ___ U.S. at ___, 113 S.Ct. at 2779.

While *Alexander* was one of the first uses[4] of the federal RICO statutes against those who sell constitutionally-protected materials of a sexually-oriented nature, it marked the continuance of a pattern of Governmental censorship which had very little to do with obscenity and everything to do with the elimination of constitutionally-protected sexually-oriented expression to which the Government was hostile.

Specifically, the primary reason why this Court should reconsider its decision in *Alexander* is that the Government has now clearly established a pattern of conduct whereby it seeks blanket forfeiture and destruction of businesses which sell, for the most part, constitutionally-protected expression consisting of erotic magazines or videotapes. The Government, now confident that it can do so with impunity, targets various businesses for destruction by the simple technique of indicting them for violation of one or more of a number of recent federal statutes authorizing forfeiture of entire businesses, no matter how large, on conviction of as few as one obscenity violation.

Recent prosecutions by the Government reveal, from the benefit of hindsight, the accuracy of Justice Kennedy's diagnosis of the forfeiture pattern exemplified by *Alexander*:

> "The admitted design and the overt purpose of the forfeiture in this case are to destroy an entire speech business and all its protected titles, thus depriving the public of access to lawful expression." ___ U.S. at ___, 113 S.Ct. at 2779.

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[4] The first such reported use is documented in *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990).

Two recent cases since *Alexander* have shown that this is a continuing pattern. In *United States v. Investment Enterprises, Inc.*, 10 F.3d 263 (5th Cir. 1993), the Government targeted for destruction three allegedly related Los Angeles companies, two of which were involved in the production and/or shipment of sexually-oriented videotapes and/or magazines. Most of the materials were, in all likelihood, non-obscene. As in *Alexander*, the Government sought massive forfeitures of all the indicted businesses based solely upon trial verdicts that but *two* of the videotapes distributed by two of the defendants were obscene. In order to forfeit and destroy hundreds of thousands of videotapes and magazines, the Government simply alleged that eight of them (which had been handpicked for prosecution by Government agents) were obscene when measured under the community standards of the Northern District of Texas (where Government agents supervised by the Department of Justice's Washington-based National Obscenity Enforcement Unit had intentionally made the case). Although eight different videotapes were charged as obscene at trial, the record reflects that only *two* were in fact necessarily found obscene.[5] While the forfeitures in *Alexander* were brought under the federal RICO statute (18 U.S.C. § 1963), the forfeitures in *Investment Enterprises* were premised upon the forfeiture provisions in 18 U.S.C. § 1467(a). That forfeiture statute provides as follows:

> "**(a) Property subject to criminal forfeiture**. A person who is convicted of an offense involving obscene material under this chapter shall forfeit to the United States such person's interest in –
>
> > **(1)** any obscene material produced, transported, mailed, shipped, or received in violation of this chapter;

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[5] See the district court's careful summary of the evidence published *sub nom. United States v. California Publishers Liquidating Corp.*, 778 F.Supp. 1377, 1380 (N.D.Tex. 1991).

> (2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and
>
> (3) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense, if the court in its discretion so determines, taking into consideration the nature, scope, and proportionality of the use of the property in the offense."

Although subdivision (e)(2) of that statute provides that the trial court has *discretion* in deciding whether to forfeit the property referred to in subsection (a)(3), the Government argued (ultimately successfully) that the forfeiture of property under § 1467(a)(3) (which is, essentially as broad as criminal RICO forfeiture under 18 U.S.C. § 1963) is *non*-discretionary, just as under the RICO statutes.

Although the district court denied the Government the broad forfeiture it had sought under § 1467 (concluding both that such forfeitures would raise significant First Amendment problems and also that, as a matter of statutory construction, it had discretion not to issue the full and drastic forfeiture order sought by the Government)[6], the Fifth Circuit, relying on this Court's then very recent opinion in *Alexander v. United States*, reversed and held that the Government was entitled to the fullest extent of blanket forfeitures which it sought in that case. 10 F.3d at 275.

Consequently, the Government succeeded, once again, in utterly destroying numerous businesses engaged in constitutionally-protected expression solely by the cynical mechanism of selectively prosecuting a minuscule number of specially selected videotapes in a

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[6] The district court's discussion of the forfeiture issues appears at pp. 1390-1394.

jurisdiction where it felt it had the best chance for obtaining at least one obscenity conviction[7] and then, on the strength of that *de minimis* finding of obscenity, forfeiting enormous inventories of presumably constitutionally-protected expression, as well as the entirety of the businesses which it had targeted for permanent censorship.

The only comparatively fortunate defendant in *Investment Enterprises* was a printing company, Great Western, Inc., whose only tangible involvement in the convicted substantive conduct was that it had printed the videotape box cover for one of the tapes for an unindicted, unrelated company which one of the other indicted corporate defendants subsequently acquired for re-sale and sold and shipped to the Government agents in Texas. Great Western was prosecuted even though there were no allegations it had either produced or shipped any allegedly obscene videotapes and notwithstanding that "a substantial portion of [Great Western's] business involves publishing material that is not sexually related." 778 F.Supp. at 1379. Although the jury found that at least one videotape box cover produced by Great Western housed a videotape that the jury determined to be obscene, that was the extent of Great Western's tangible involvement proven at trial. Nonetheless, the jury found that sufficient and it convicted Great Western on charges of aiding and abetting and conspiracy to commit an obscenity offense under 18 U.S.C. § 1462. The other two corporate defendants were also convicted of obscenity charges, although the jury necessarily[8] found only two of the eight charged films obscene.

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[7] Unlike RICO forfeiture, which requires *two* predicate obscenity offenses, forfeiture under 18 U.S.C. § 1467 requires only *a single* obscenity conviction in order to trigger the massive forfeitures which the Fifth Circuit held to be mandatory under that statute.

[8] The jury convicted on only two of the six substantive obscenity counts. However, each of those two counts charged two different films. While it is conceivable the jury may have found all four films obscene, it is only necessarily the case that it found two of them obscene.

The district court denied the Government's subsequent motion for forfeiture of the entirety of Great Western's business (including its printing presses) making the following cogent observation:

> "In the present case, the situation of Great Western raises the most significant First Amendment concerns. As already explained, because Great Western manufactured a 60-cent video tape box cover the Government seeks the forfeiture of Great Western's printing facility." 778 F.Supp. at 1392.

The district court made a similar observation with respect to the other two corporate defendants:

> "The situation of [the other two corporate defendants] is similar to that of Great Western because they too were threatened with total forfeiture of their assets for transporting $9.90 worth of obscene video tapes across state lines. Great Western's position is different, however, because Great Western did not actually handle, ship, or otherwise process the order for the videotapes found to be obscene." 778 F.Supp. at 1392, n.17.

Largely because *Alexander* had not yet been decided, and the Government no doubt sought to keep reports of its increasing appetite for forfeiture of expressive materials and businesses away from this Court while *Alexander* was pending, the Government did not appeal the denial of its attempted forfeiture of Great Western. However, it did appeal the district court's refusal to issue a blanket forfeiture order against the other two media companies, Great Western's two corporate co-defendants.

As noted above, the Fifth Circuit, relying on this Court's ruling in *Alexander*, reversed and required *total forfeiture* of both businesses based solely on the jury's conclusion that two videotapes in their massive inventories were in fact obscene. Moreover, the court's opinion made clear that had the Government appealed the district court's refusal to order forfeiture of Great Western and its printing presses, that order would have been reversed as

well. In short, the censorial devastation unleashed by *Alexander* is perhaps far beyond anything this Court may have imagined.

The Government's use of forfeiture statutes for censorship purposes was also demonstrated in the case of *United States v. Krasner*, 841 F.Supp. 649 (M.D.Pa. 1993). In that case the Justice Department once again sought wholesale forfeitures of businesses engaged in sexually explicit media materials, all of which were presumably protected by the First Amendment. Unlike the techniques employed in *Alexander* (criminal RICO forfeiture) and *Investment Enterprises* (forfeiture under 18 U.S.C. § 1467), the *Krasner* indictment sought forfeiture under 18 U.S.C. §§ 1956, 982 and 853. Title 18 U.S.C. § 1956 is the federal money laundering statute which makes it a crime to conduct or attempt to conduct a financial transaction which involves the proceeds of "specified unlawful activity" when one knows that the property involved in the transaction represents the proceeds of some form of unlawful activity. The "specified unlawful activity" includes any "felony under state, federal, or foreign law. . . . " 18 U.S.C. § 1956(a)(c)(1).

In turn, 18 U.S.C. § 982(a)(1) allows criminal forfeiture of all "property, real or personal, involved in" any violation of the money laundering statute, 18 U.S.C. § 1956. The indictment also sought forfeiture under the broader forfeiture language of 18 U.S.C. § 853(a)(2), which allows forfeiture of "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such violation; . . . . "

The district court's opinion in *Krasner* recognized that the Government sought to forfeit "the defendants' *entire media empire* based upon the judicially determined obscenity of a *handful* of videos and magazines" (841 F.Supp. at 659, emphasis added) but found that, under this Court's opinion in *Alexander*, the Government would not be precluded from obtaining such forfeiture should it prove its case at trial.

Again, the clear pattern shown is one where the Justice Department, hostile to a particular form of protected expression (*i.e.*, any type of sexually explicit media materials regardless of whether they are legally obscene), seeks to destroy the businesses engaged in such lawful activity by carefully selecting and prosecuting a few videos or magazines hoping that one or two obscenity convictions can be obtained. If successful, the Government then has a green light, from this Court's *Alexander* opinion, to accomplish its true goal of mass censorship of vast quantities of presumptively-protected sexually-oriented expression, as well as all equipment for its production and dissemination. This is, again in Justice Kennedy's words, "restraint in more than theory . . . [and] censorship all too real." *Alexander*, 113 S.Ct. at 2779.

Finally, if any further proof were required that the Government's true purpose here is simply to eliminate sexually explicit materials, regardless of whether they are legally obscene, three additional factors strongly demonstrate that purpose. First, as observed by Justice Kennedy in his dissent in *Alexander*:

> "The unrestrained power of the forfeiture weapon was not lost on the Executive Branch, which was quick to see in the amended [RICO] statute the means and opportunity to move against certain types of disfavored speech. The Attorney General's Commission On Pornography soon advocated the use of RICO and similar state statutes to 'substantially handicap' or 'eliminate' pornography businesses. 1 United States Dept. of Justice, Attorney General's Commission On Pornography, Final Report 498 (1986). As these comments illustrate, the constitutional concerns raised by a penalty of this destructive capacity are distinct from the concerns raised by traditional methods of punishment." 113 S.Ct. at 2778.

Second in the *Alexander* case itself, the Government's disposition of the defendant's forfeited inventory clearly shows the Government's intent. The Government not

only forfeited, but then *destroyed* all of the defendant's vast quantities of videotapes and magazines, all but seven titles of which were presumably constitutionally protected. In contrast, in typical RICO forfeitures, the Government either sells non-contraband inventory at auctions, or it sells the otherwise lawful businesses that possess such inventory. Moreover, the Government presumably destroyed all copies *of even the six titles of videotapes and magazines* which the jury concluded were *not* obscene. The Government's cavalier destruction of unlitigated presumptively protected expressive materials and the dismantling and sale of Alexander's 30 year old statewide media business clearly demonstrate that the Government's purpose was to eliminate Alexander's *entire* inventory of sexually explicit materials, not merely that which was obscene. Again, this is unbridled censorship at its worst.

Finally, the Government's clearly expressed desire to suppress constitutionally-protected materials dealing with sex, regardless of obscenity, is also evidenced by its conduct as revealed in the following published opinions: *Playboy Enterprises, Inc. v. Meese*, 639 F.Supp. 581 (D.D.C. 1986); *Freedberg v. U.S. Dept. of Justice*, 703 F.Supp. 107 (D.D.C. 1988); *PHE, Inc. v. U.S. Dept. of Justice*, 743 F.Supp. 15 (D.D.C. 1990); and *U.S. v. PHE, Inc.*, 965 F.2d 848 (10th Cir. 1992); *see also Council for Periodical Distributors Association v. Evans*, 642 F.Supp. 552 (M.D.Ala. 1986), *aff'd* 827 F.2d 1483 (11th Cir. 1987) (showing the equally relevant hostility of local prosecutorial officials intent on suppressing all sexually-oriented material, not merely that which is obscene).

For all the reasons above, this Court should reconsider its opinion in *Alexander* in recognition of the extremely dangerous censorial tool it has unleashed. Moreover, while today's targets of the Government's wrath are currently limited to those who specialize in sexually explicit expression, history teaches that, once the exercise of such powers becomes commonplace, they will only expand. Tomorrow's forfeiture targets may well be

national videostore chains, national bookstore chains, magazines such as Playboy, and ultimately, if total self censorship due to sheer terror has not otherwise been achieved, major motion picture studios, cable and broadcast television stations and networks, computer bulletin boards and perhaps the Internet itself, may well prove eventual targets.

Ultimately unless the First Amendment principles of *Alexander* are repudiated, it is only a matter of time until future administrations target others in the communications media by mechanisms such as making libel offenses predicate RICO crimes or predicate money laundering offenses and then destroying their political enemies when a given publication, written in the heat of political struggle, may be found libelous in some small respect or other.

For all these reasons, blanket forfeiture of expressive materials and businesses based solely on prior speech violations authorizes an appalling and totalitarian censorship power which is now being actively used by the Government and which will only expand unless quickly checked. At the very least, this Court should reconsider its views in *Alexander* in order to put some First Amendment limits upon this incredibly devastating censorial tool.

II. RECONSIDERATION OF THE FIRST AMENDMENT PORTIONS OF THIS COURT'S DECISION IN ALEXANDER v. UNITED STATES IS NECESSARY IN ORDER TO RECONCILE THAT OPINION WITH A NUMBER OF THIS COURT'S OTHER OPINIONS WITH WHICH IT IS IN CONFLICT.

A. The First Amendment Portion Of This Court's Opinion In *Alexander v. United States* Establishes A Very Dangerous Precedent In Clear Conflict With Its Prior Decisions To The Extent That It Evaluates Prior Restraints Solely On The Basis Of Their *Form*, And Not On The Basis Of Their *Effect* On Protected Expression.

In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957), this Court articulated the bedrock First Amendment

principle, derived from its prior holding in *Near v. Minnesota*, 283 U.S. 697 (1931), that future speech cannot be suppressed before its dissemination simply on the basis that an individual has committed *prior* speech violations:

> "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. In the language of Mr. Chief Justice Hughes, 'this is of the essence of censorship.' 283 U.S. at p. 713." 354 U.S. at 445.

Notwithstanding the language above, the federal RICO statutes and other similar forfeiture statutes now authorize the Government to destroy the printing presses of any business solely because it may be able to prove that on one or two prior occasions, that business engaged in a prior speech violation, *i.e.*, an obscenity offense. Similarly, as shown in *Alexander*, these forfeiture statutes authorize the destruction of unlimited quantities of presumptively protected expression toward which the Government may be hostile, solely on proof of one or two prior speech violations.

Aware of the potential application of the clear language of *Near* and *Kingsley Books*, the *Alexander* opinion suggested a distinction of those cases which it believed would allow it to uphold blanket obscenity-predicated RICO forfeitures without overruling the clear First Amendment principles of *Near* and *Kingsley*. Specifically, this Court implicitly asserted the very novel proposition that the prior restraint doctrine is essentially one of form, rather than substance, and applies only to "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." ___ U.S. at ___, 113 S.Ct. at 2771 (emphasis in original). Judicial orders which merely *destroy* protected media materials or which order destruction of the means of producing or disseminating expression are apparently not prior restraints because they do not *expressly forbid* future expression. It is very respectfully submitted that this distinction is utterly flawed and

creates a nightmare for the lower federal courts who must reconcile *Alexander* with a host of this Court's prior *and* subsequent opinions with which it is in conflict.

Under the *Alexander* holding, any judicial order challenged as a prior restraint must in fact *expressly forbid* future speech. It is apparently not enough that a judicial order commands the destruction of the printing presses (as the RICO statute approved in *Alexander* would allow and as was sought and implicitly sustained by the Fifth Circuit under the comparable forfeiture statute of 18 U.S.C. § 1467 in *Investment Enterprises, supra*), nor is it apparently enough that judicial orders command the entire destruction of a speech business (as was in fact done in *Alexander*). Rather, this Court's majority rationale requires that the judicial order is only a prior restraint if it *expressly forbids* future communications in advance of their occurrence. However, this distinction is irreconcilable with a host of this Court's cases which invalidated mass seizures as prior restraints. *See, e.g, Quantity of Books v. Kansas*, 378 U.S. 205 (1964); and *Marcus v. Search Warrants*, 367 U.S. 717 (1961). *See also Roaden v. Kentucky*, 413 U.S. 496 (1973); and *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968). (Indeed, in *Roaden*, this Court *expressly held* that the type of seizure condemned in *Marcus, Quantity of Books v. Kansas*, and *Lee Art* "is plainly a form of prior restraint. . . . " 413 U.S. at 504.) Moreover, in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63-64 (1989), this Court reaffirmed that "[i]t is '[t]he risk of *prior restraint* . . . which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials' " and concluded that *"[t]hese same concerns render invalid the pre-trial seizure at issue here." Id.* (emphases added).

The judicial seizure orders condemned as prior restraints in the cases above did *not* "forbid" future expression as required by the new *Alexander* test for prior restraint. Those judicial orders did no more than the

judicial order of forfeiture upheld in *Alexander*; they simply removed existing unlitigated materials from circulation. They did *not* expressly enjoin the book store owners from restocking their shelves with other copies of those same books and magazines in the future. Accordingly, the seizure orders condemned as prior restraints in those cases would *not* be prior restraints under this Court's new "*Alexander* definition" of "prior restraint". As a result, since this Court did not overrule its decisions in *Quantity of Books*, *Marcus*, *Roaden*, *Lee Art*, or *Fort Wayne Books*, the lower federal courts are left hopelessly confused in determining what is or is not a prior restraint of expression.

Similarly, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court condemned, as a prior restraint, *informal prosecutorial threats* aimed at deterring book store owners from carrying certain titles of books or magazines which local authorities were trying to suppress through intimidation. Regardless of whether this Court, in retrospect, might hereafter choose to characterize the *Bantam Books* ruling as one involving "chilling effect" rather than "prior restraint," under either doctrine, the same underlying principle should have condemned the blanket RICO forfeiture order issued in *Alexander*. While the forfeiture order in *Alexander* imposed an absolute prior restraint which utterly crippled and destroyed those businesses which were engaged in presumptively protected expression, its *effect* on those businesses, even if not deemed a "prior restraint", was certainly no less "chilling" of those businesses' future expressive activity than the informal prosecutorial threats condemned in *Bantam Books*.[9]

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[9] The majority opinion in *Alexander* asserts that the forfeiture orders in *Alexander* were not prior restraints because they did not "forbid" future communications. With all due respect, this is an extremely disingenuous distinction. Certainly with respect to the ten separate book stores and approximately eighteen different businesses which were utterly destroyed and permanently disabled, the forfeiture order no less rendered certain their future inability to engage in expression than an injunction which would

In any event, because the *Bantam Books* opinion itself characterized the activity in that case as a "prior restraint," review should be granted herein if only to explain any new view of that case to the numerous lower federal courts who are frequently called upon to apply it (as evidenced by the numerous lower federal court decisions cited at page 17, *supra*).

When viewed in terms of the fundamental First Amendment principles involved where Government attempts to forfeit the entirety of any business which commits a prior speech violation, it is clear that *Alexander*'s attempted distinction of prior restraints as only those administrative or judicial orders which *expressly forbid* future expression is an exaltation of form over substance of the worst possible type. Indeed, the impossibility of adhering to such an artificial distinction is not only shown by this Court's cases condemning mass pretrial seizures, but was also recently illustrated in *Ladue v. Gilleo*, ___ U.S. ___, n.13, 114 S.Ct. 2038, 2045 n.13 (1994), where this Court held:

> "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech.[13]
>
> [13]. [T]he first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression." *Id.*

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expressly *forbid* any future expressive activities by those companies or stores. Indeed, pursuant to the district court's forfeiture orders, the real property of those stores was sold to unrelated third parties and the other assets of these businesses, *i.e.*, their inventory, fixtures, vehicles, accounts, etc. were all taken by the Government. This is at least as much of a "legal impediment" (*Alexander*, 113 S.Ct. at 2771) as any search warrant requiring mass seizures of expression.

In *Ladue*, this Court properly looked at the *effect* of the speech restraint there at issue, not its *form*. If the Court had strictly looked at the form of the restraint in that case, it would have upheld the restriction because the ban on residential signs was content neutral. However, this Court properly recognized that even content neutral restrictions can simply "suppress too much speech." Surely if there were ever a Governmental tool of restraint which "suppress[es] too much speech" a blanket RICO forfeiture order is such a mechanism.

This Court's *Ladue* opinion is consistent with the broader First Amendment principle, articulated in many of this Court's cases, but ignored in *Alexander*, that, in looking at governmental regulations or actions challenged as violative of the First Amendment, courts must look through the form of the restraint to its substance and effect. Though the *form* of the restraint in *Alexander* was not a judicial order expressly forbidding future speech, there was no need for such an order because the practical *effect* of the order which the Court *did* uphold, insured that there *would be no* future speech by that defendant or any of his businesses. Those businesses were ordered destroyed along with their inventories of expressive materials and the wherewithal to restock and begin again.

Similarly, in the mass seizure cases, even though there was no order forbidding future expression, the judicial orders which ordered the elimination of massive quantities of *presently existing* speech were deemed sufficient, in and of themselves, to warrant their condemnation as prior restraints of expression. This Court wisely looked to the *effect* of those judicial warrants on the public's access to protected expression, rather than to the *form* of those orders.

This Court's primary focus on the *effect* of governmental action on expression began with its opinion in *Near v. Minnesota*, 283 U.S. 697, 713 (1931), holding that the Court will "cut through mere details of procedure" to analyze realistically "the operation and effect of the statute in substance." In *Kingsley Books*, 354 U.S. at 441, the

Court reiterated that "[t]he judicial angle of vision in testing the validity of a statute . . . is 'the operation and effect.' "

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), this Court repudiated attempts to finesse the First Amendment by resort to "mere labels" (*e.g.*, "racketeering activity" or "punishment"), holding that labels cannot confer "talismanic immunity from constitutional limitations."

Most recently, in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. at 67, this Court reaffirmed this principle:

> "As far back as the decision in *Near v. Minnesota ex rel. Olson*, . . . this Court has recognized that the way in which a restraint on speech is 'characterized' . . . is of little consequence . . . ."

Whether a restraint on expression is characterized as a judicial order *specifically forbidding* future expression, or merely a judicial order which guarantees that there *can be no future expression*, the *effect* of such restraints is equivalent. Solely premised upon a very few prior speech violations, the various forfeiture statutes described herein insure that the businesses involved in such expression will be permanently disabled and rendered incapable of engaging in *any* future expressive activity. Any other distinctions are simply semantical.

Finally, this Court's decision in *Alexander* is also inconsistent with its discussion of applicable First Amendment principles in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In that case, this Court upheld the one-year closure of a book store due to repeated lewd conduct and prostitution on the premises. Although this Court concluded that First Amendment scrutiny was not required in analyzing the non-speech-predicated closure sanction, both the majority opinion and Justice O'Connor's concurrence emphasized that where, as here, a media business is ordered shut down solely on the basis of *prior speech violations*, such a sanction *must* be analyzed under heightened First Amendment standards. In upholding the non-speech predicated closure order, the

majority opinion in *Arcara* stressed that the basis for the closure order was not related to any prior *expressive* activities by the bookstore in question:

> "[T]he closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited – indeed, the imposition of the closure order has nothing to do with any expressive conduct at all." 478 U.S. at 705, n.2.
>
> * * *
>
> "[W]e have subjected . . . [criminal and civil sanctions on expressive businesses] to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . ." 478 U.S. at 706.
>
> "Here, however, the 'non-speech' conduct subject to a general regulation bears absolutely no connection to any expressive activity." 478 U.S. at 706, n.3.

Similarly, in Justice O'Connor's concurrence, she states:

> "If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books . . ., the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." 478 U.S. at 708.

This Court's decision in *Alexander* is clearly in conflict with all of the above-quoted language from *Arcara*. If this Court intends to repudiate this language in *Arcara*, petitioners respectfully submit that it should grant review herein and do so directly. However, as currently written following *Alexander*, this Court's prior restraint jurisprudence is in hopeless conflict with itself and in dire need of clarification.

B. This Court's Opinion In *Alexander* Should Also Be Reconsidered Because It Is Inconsistent With Its Prior Decisions Which Correctly Observe The Increased Chilling Effect Which Is Caused When Laws Which Prohibit Expression Are Either Vague, Lack Adequate Scienter Provisions, Or Impose Enormous Statutory Penalties.

The final reason to grant review herein is to permit this Court to re-examine whether *Alexander* is consistent with the broad principles articulated in *Smith v. California*, 361 U.S. 147 (1959), and *New York Times Company v. Sullivan*, 376 U.S. 254 (1964). In *Smith*, this Court invalidated an anti-obscenity ordinance on grounds of its "chilling effect" on protected expression, notwithstanding that the maximum punishment was *de minimis* compared to today's severe RICO-obscenity forfeiture sanctions. The ordinance was invalidated in *Smith* because it lacked any requirement of scienter. This Court observed that if such a law were upheld:

> "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." 361 U.S. at 153.

Even though the misdemeanor penalties in *Smith* were minimal, the absence of any scienter requirement was held to have a sufficient *in terroram* impact (*i.e.*, chilling effect) on exercise of expressive rights to require its invalidation under the First Amendment.

In *New York Times Co. v. Sullivan*, this Court revisited the question of chilling effect in the context of a civil libel statute. The Court noted the chilling effect attributable to *a combination of* a non-rigorous scienter requirement coupled with enormously high penalties for those who err in distinguishing protected from unprotected expression. To reduce that synergistically-created chilling effect, this Court imposed a heightened scienter requirement in libel cases involving public figures; it required proof that the defendant knew its statement was false or that it recklessly disregarded whether it was false or not. Scienter standards of strict liability or

mere negligence were both deemed insufficient to prevent an unacceptable chilling of protected expression.

Petitioners respectfully submit that if this Court fully considers the practical *effect* of governmental regulations of obscenity, rather than their mere form, it will acknowledge that the chilling effect of any such law on protected expression will increase or decrease depending on the presence, absence, or strength of any of three factors: (1) whether the law's substantive proscriptions are clear or "dim and uncertain" (*Bantam Books, Inc. v. Sullivan*, 372 U.S. at 66); (2) whether it has a strong or weak scienter provision; and (3) whether the penalties for a violation are relatively modest or severe.

The majority opinion in *Alexander* ignored the practical reality of the combined effect of these three factors and in simple tautological fashion argued that RICO's forfeiture statute cannot have an undue chilling effect since the chilling effect of these three components, *viewed separately*, has never been found to have reached unconstitutional proportions. For example, the vagueness of obscenity laws was upheld against constitutional challenge in *Miller*; a lax scienter requirement for such laws was upheld in *Hamling v. United States*, 418 U.S. 87 (1974); and severe jail sentences and fines for violations of such laws have been upheld in a number of other cases. However, the *Alexander* opinion did *not* consider the practical real world impact of the combination of *all three* of these factors, particularly where the punishment now includes, for the first time, the total forfeiture of one's businesses (in addition to incarceration and stiff fines). It is respectfully submitted that the combination of all three of these factors yields a chilling effect of self-censorship which is far greater than the chilling effect attributable to any one or two of these factors, and that the resultant chilling effect will accomplish, by self-censorship, the elimination of vast quantities of constitutionally-protected expression, something which the Government has already proclaimed as its underlying goal.

Each of these factors have significant chilling impacts on expression. First, though this Court has consistently refused

to find obscenity laws unconstitutionally vague, it cannot deny (indeed it has admitted) that it is a "dim and uncertain line"[10] which separates obscenity from protected expression and that it is *impossible* for one to determine, in advance, whether any particular film or magazine will be found obscene by a jury.[11] This Court need only examine the split jury determination in *Alexander* for proof of this fact. Seven of the charged items were found obscene while six were found non-obscene. No one could have predicted in advance which items were or were not obscene.

Second, regarding scienter, this Court, in *Hamling*, held that an obscenity defendant need not be proven to *know* that materials were obscene when disseminated. This Court held that it "is constitutionally sufficient that . . . a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." 418 U.S. at 123. However, as construed and applied by the lower federal courts, this is an *extremely* lax scienter requirement.

Nonetheless, there are a *variety* of alternatives for an obscenity scienter requirement that could substantially reduce this chilling effect. At one extreme, this Court could, given the inherent vagueness of obscenity laws, permit Government to initiate obscenity prosecutions only after it first obtained a civil determination of the obscenity of specified materials, where a defendant, having notice of such determination, thereafter proceeded to distribute the materials.

A less rigorous scienter requirement that would still be far more protective of expressive rights than that which the lower federal courts presently recognize, would permit an

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[10] *Bantam Books*, 372 U.S. at 66.

[11] Indeed, in *Adult Video Association v. U.S. Dept. of Justice*, 853 F.Supp. 263 (W.D.Tenn. 1994), *appeal pending*, the district court even held that the producer of a sexually-oriented film was not entitled to seek a pre-enforcement declaratory judgment as to whether a film it intended to distribute was obscene or constitutionally-protected in that federal judicial district! How can massive RICO forfeitures be justified where laws are this hopelessly opaque in their application to expression?

affirmative defense that an obscenity defendant reasonably believed that the charged materials would not violate the community standards of the district where they are being prosecuted.[12]

Yet another variation of the scienter theme was rejected by federal courts in *both Krasner* and *Investment Enterprises*. In both of those cases, the Government charged the defendants not only with *substantive* obscenity offenses, but also with a *conspiracy* to violate the obscenity laws. With respect to these conspiracy counts, the defendants in both cases alleged that, since conspiracy is a specific intent crime, and since books and magazines are not obscene *per se*, but may only be found obscene in *a particular community* applying *local* community standards, there must, at the least, be knowledge on the part of each co-conspirator of the federal district into which the materials are to be sent (assuming they are not charged in the district of shipment). However, in both the *Krasner* and *Investment Enterprises* cases, the courts rejected that limited scienter argument as well.[13]

In sum, the federal courts are presently applying the *most vague* law in the federal penal code, using it to obtain the *maximum* forfeiture penalties allowed by law (penalties

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[12] This scienter requirement was rejected by the district court's opinion in *Krasner, supra*, 841 F.Supp. at 654-655:

> "The defendants contend that they should be allowed to present evidence that they had a good faith, albeit mistaken, belief that the materials that they shipped would not offend the contemporary community standards of the recipient community." 841 F.Supp. at 655.

Relying on its interpretation of this Court's decision in *Hamling*, the district court refused to allow the defendants the opportunity to establish this defense.

[13] Though the *Krasner* opinion does not reference this motion, undersigned counsel was the same counsel who filed this motion in *Krasner* and can assure this Court that it was duly filed therein.

Undersigned counsel made the same motion in *Investment Enterprises*, seeking dismissal of the conspiracy count. The district court, in an unpublished order, rejected this motion as did the Court of Appeals in a brief, somewhat cryptic reference thereto in footnote 5 of its opinion. 10 F.3d at 267.

initially designed for the elimination of contract murderers and arsonists), and are employing scienter standards which the lower federal courts have construed in so lax a manner as to not even require that the defendant be aware of the particular federal district into which the materials are to be shipped and by whose community standards they must be judged.

Besides clarifying the utterly obscure law of prior restraint in the wake of *Alexander*, review in this case could also allow this Court an opportunity to creatively address the very real problems of chilling effect and self-censorship which face petitioners herein.

CONCLUSION

For the reasons above, it is respectfully urged that this Court grant review herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADULT VIDEO ASSOCIATION, a California corporation, DOE, INC., a California corporation, RICHARD ROE, ROE, INC., a Utah corporation, PAUL POE, and LORETTA HAROIAN,

Plaintiffs,

v.

RICHARD THORNBURGH, in his official capacity only as Attorney General of the United States,

Defendant.

NO. CV 87-7894-RSWL

ORDER

(Filed Aug. 18, 1989)

Defendant, the Attorney General of the United States ("Thornburgh")[1], filed a motion to dismiss plaintiffs' First Amended Complaint ("Complaint") on February 22, 1988. Plaintiffs (collectively "Adult Video") timely filed opposition and Thornburgh filed a reply. Oral argument on the motion was originally scheduled for March 21, 1988 but was continued several times by stipulation of the parties. During the period of March 21 to June 9, 1989 the parties filed several supplementary briefs concerning recent

[1] When plaintiffs commenced this action, Edwin Meese III was Attorney General of the United States and the named defendant. Pursuant to Fed. R. Civ. P. 25(d)(1), Richard Thornburgh has been substituted in as the named defendant.

Supreme Court decisions relevant to the matter now before this Court. In June 1989, after the supplemental briefing was concluded, the Court took Thornburgh's motion under submission for disposition based on the papers pursuant to Fed. R. Civ. P. 78.

Now, having read and considered all the filed papers, the Court hereby issues the following orders:

Thornburgh's Motion to Dismiss Adult Video's Complaint is GRANTED IN PART and DENIED IN PART. Specifically, all claims alleging violation of the Fifth Amendment are DISMISSED. All claims alleging impermissible chilling effects in violation of the First Amendment are DISMISSED. The claim which seeks to enjoin Thornburgh from enforcing a particular interpretation of 18 U.S.C. § 3142(e) is DISMISSED. All but one of the claims alleging prior restraints in violation of the First Amendment are DISMISSED. The claim which alleges that 18 U.S.C. § 1964 authorizes prior restraints in violation of the First Amendment withstands a Fed. R. Civ. P. 12(b) (6) challenge and Thornburgh's Motion to Dismiss this portion of the Complaint is DENIED.[2]

JURISDICTION

Adult Video seeks declaratory and injunctive relief against the enforcement of various federal statutes on the ground that said statutes violate the Constitution of the

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[2] All claims alleging violation of the Eighth Amendment have been voluntarily withdrawn by Adult Video. Opposition, p. 8, ll. 8-12.

United States. Accordingly, this Court has federal question jurisdiction over the matter pursuant to 28 U.S.C. § 1331.

Furthermore, this Court has jurisdiction pursuant to 28 U.S.C. § 1346(a) (2) because Thornburgh is being sued in his official capacity as an officer of the United States Government for an amount not exceeding $10,000.00 on a claim founded upon the United States Constitution.

In addition, this Court has authority under 28 U.S.C. § 2201 to declare the rights of the parties before it and, pursuant to 28 U.S.C. § 2202, may issue such further relief, including injunctive relief, as it deems necessary and proper.

BACKGROUND

In 1970 Congress enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO"), codified at 18 U.S.C. §§ 1961-68. RICO authorizes criminal penalties and civil restraints against persons convicted of engaging in a "pattern of racketeering activity," which is defined at 18 U.S.C. § 1961(5) as requiring two or more violations of various predicate offenses set forth at 18 U.S.C. § 1961(1). RICO also authorizes certain pretrial restraints designed to preserve the availability of property which the Government contends is subject to forfeiture. The predicate offenses listed in the original RICO statute did not include violations of any state or federal anti-obscenity laws.

In 1984 Congress enacted the "Comprehensive Crime Control Act of 1984" ("1984 Act"), which included the

three provisions now challenged by Adult Video. First, the 1984 Act added "dealing in obscene matter" as a predicate RICO offense. Second, the 1984 Act incorporated the "Bail Reform Act of 1984" ("Bail Act"), which altered the rules pertaining to release on bail for those charged with, or appealing from conviction of, federal crimes, including federal obscenity violations. The provisions of the Bail Act which are challenged by Adult Video are codified at 18 U.S.C. §§ 3142-43, 3147, and 3148. Third, the 1984 Act incorporated the "Sentencing Reform Act of 1984" ("Sentencing Act"), codified at 18 U.S.C. § 3551-3673 and 28 U.S.C. §§ 991-98, which modified federal sentencing parameters, including those applicable to obscenity offenses and to obscenity-predicated RICO offenses.

Adult Video challenges RICO and the Bail and Sentencing Acts where they apply to defendants whose only offenses are obscenity violations. The specific provisions of RICO and the Bail and Sentencing Acts challenged by Adult Video are:

RICO

(i) 18 U.S.C. § 1961(1), which establishes federal and certain state obscenity violations as predicate offenses under RICO;

(ii) 18 U.S.C. §§ 1963(a) and (e), which establish maximum prison terms and fines for RICO convictions and authorize post-judgment forfeiture of any and all assets of or related to any enterprise connected with a RICO violation;

(iii) 18 U.S.C. § 1963(d), which authorizes court orders, including restraining orders and injunctions based on probable cause, designed to preserve the availability of property for forfeiture prior to a trial on the merits;

(iv) 18 U.S.C. § 1964, which authorizes civil RICO sanctions including dissolution and divestiture orders and injunctions against "engaging in the same type of endeavor as the enterprise engaged in";

BAIL ACT

(i) 18 U.S.C. § 3142(e), which authorizes pretrial detention if "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community . . . ";[3]

(ii) 18 U.S.C. §§ 3142(d) and 3148(b), which together authorize a ten day detention period pending a bail revocation hearing for defendants of whom there is probable cause to believe that, while on release, they committed a felony and there is no "condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community";

(iii) 18 U.S.C. § 3143(b) which, as amended by the Bail Act, mandates pre-appeal detention unless the requirements for bail set forth at

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[3] In addition to asserting constitutional objections to 18 U.S.C. § 3142(e) as it applies to obscenity offenses, Adult Video also seeks to *prevent* Thornburgh from interpreting the statute such that obscenity violations are deemed potential threats to the "safety of any other person and the community."

§ 3142(e) are met *and* the "appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in" reversal, an order for a new trial, or a sentence that does not include a term of imprisonment or that significantly reduces the term of imprisonment.

SENTENCING ACT

The Sentencing Act created the United States Sentencing Commission ("Commission"), which has enacted sentencing guidelines that provide the basis for determining sentences, including those of defendants convicted of violating RICO and the federal obscenity laws defined at 18 U.S.C. §§ 1461-1465. Absent unusual aggravating or mitigating circumstances which must be made the subject of specific findings, the sentencing guidelines are determinative of the sentence which must be imposed. Adult Video alleges that the base sentencing level (nineteen) for any RICO offense and for certain federal obscenity offenses authorizes unconstitutionally harsh fines and prison terms.

Adult Video alleges that the "foregoing provisions of federal law: (1) cause a chilling effect upon constitutionally protected expression, in violation of the First Amendment to the United States Constitution and the Due Process requirements of the Fifth Amendment to the United States Constitution; (2) authorize prior restraints of speech in violation of those same constitutional provisions; and (3) require imposition of excessive fines, excessive bail, pre-trial and pre-appeal detentions without bail, and cruel and unusual punishment, all in violation of the First and Eighth Amendments to the United States Constitution." Complaint, p. 25, ll. 2-15.

STANDING

Thornburgh has raised the issue of standing. While acknowledging that Adult Video may raise First Amendment objections to the challenged statutes on their face, Thornburgh disputes Adult Video's standing to challenge the statutes as they might be applied to others. While Thornburgh is correct as a matter of law, his assertions must be clarified.

The traditional rule of standing is that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court." *New York v. Ferber*, 458 U.S. 747, 769 (1973). However, the traditional standing rule is excepted in the First Amendment context, where "persons [may] attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." *Ferber*, 458 U.S. at 769. This exception is necessary because "[t]hose whose expression is 'chilled' by the existence of an overbroad or unduly vague statute cannot be expected to adjudicate their own rights, lacking by definition the willingness to disobey the law." L. Tribe, American Constitutional Law § 12-32 (2d ed. 1988).

Failure to prevail on the merits of a facial First Amendment challenge, however, must not be confused with standing to bring that challenge in the first place: "The requirement that a statute be 'substantially overbroad' before it will be struck down on its face is a 'standing' question only to the extent that if the plaintiff does *not* prevail on the merits of its facial challenge and

cannot demonstrate that, as applied to it [i.e., to all persons], the statute is unconstitutional, it has no 'standing' to allege that, as applied to others, the statute might be unconstitutional." *Secretary of State of Md. v. J.H. Munson Co., Inc.*, 467 U.S. 947, 959 (1984) (emphasis added). Of course, the standard for determining whether a statute is overbroad is rigorous.

A statute under attack for facial invalidity must be construed by courts to avoid constitutional problems if it is subject to such a limiting construction. *Ferber*, 458 U.S. at 769. Overbreadth must be substantial before a statute is declared unconstitutional on its face. Similarly, the "mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional. . . . " *Fort Wayne Books, Inc. v. Indiana*, ___ U.S. ___, 109 S.Ct. 916, 925-26 (1989). "[D]eterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and [the Supreme Court has] long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.' " *Id.* (quoting *Smith v. California*, 361 U.S. 147, 154-55 (1959)).

As the overbreadth doctrine applies uniquely to the First Amendment, and as Adult Video has not been prosecuted under the challenged statutes, Adult Video lacks standing to bring its Fifth Amendment due process claims. Adult Video also lacks standing to enjoin Thornburgh from interpreting and applying 18 U.S.C. § 1342(e) in a manner not apparent on the face of the statute.

However, Adult Video does have standing to bring its First Amendment objections before this Court.

CHILLING EFFECT

Adult Video alleges that the challenged statutes, where executed in conjunction with obscenity offenses, are overbroad and impermissibly vague, thereby causing a chilling effect on the free expression of protected speech in violation of the First Amendment. Adult Video claims that the chilling effect is specifically caused by a combination of three factors: (1) the inherent ambiguities of the standard for obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973); (2) the *de minimus* scienter requirements for obscenity offenses; and (3) the "draconian" punishments for obscenity violations now authorized by RICO and the Bail and Sentencing Acts.

Thornburgh's principle argument against such claims is that, because the Supreme Court has held the *Miller* standard *not* to be unconstitutionally vague, any "chilling" argument premised in whole or in part on a different view of *Miller* is untenable. *See, e.g., Smith v. United States*, 431 U.S. 291, 308-09 (1977); *Fort Wayne Books*, 109 S.Ct. at 924 ("Petitioner argues that the 'inherent vagueness' of the standards established by [*Miller*] are at the root of his objection to any RICO prosecution based on predicate acts of obscenity (citation omitted). Yet, this is nothing less than an invitation to overturn *Miller* – an invitation that we reject."). Adult Video acknowledges the Supreme Court's holdings regarding the federal obscenity standard, but claims that *Miller* need not be *unconstitutionally* vague to nevertheless implicate ambiguities which, when

combined with other deterrents, cause an impermissible chilling effect.

While there is some practical merit to Adult Video's contention, the Court must construe this argument as an artful attempt to bypass the Supreme Court's dictates regarding *Miller*. A majority of the Supreme Court has consistently held that *Miller* provides a line for distinguishing obscenity from non-obscenity which is bright enough to withstand constitutional challenge. Such a holding implies that one who commits an obscenity offense is deemed by law to have adequate notice of the wrongfulness of his conduct and a concomitant ability to tailor his behaviour accordingly. In keeping with this reasoning, severe penalties for obscenity violations serve only to deter wrongdoing, not to inhibit lawful activity: if an individual knows the difference between the legal and the illegal, between protected expression and obscenity, harsh penalties will only discourage him from engaging in activity which he *knows* is unlawful and will not, or at least not significantly, deter him from engaging in activity which he *knows* is lawful and thus not subject to prosecution.

Given the Supreme Court's clear mandate regarding the *Miller* standard, it is not within the power of this Court to deny Thornburgh's Motion to Dismiss Adult Video's allegations that the challenged statutes chill free speech.

PRIOR RESTRAINTS[4]

A. 18 U.S.C. § 1963(a) and (e):

For reasons already stated, the Court is unwilling to hold that RICO's provisions for fines, prison terms, and forfeiture, create an impermissible chilling effect on free speech. There remains, however, the question of whether RICO's post-trial forfeiture provisions authorize prior restraints.

The Supreme Court has not yet ruled directly on this matter. However, in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), the Supreme Court held that where a punishment does not aim at suppressing free speech, incidental infringements on First Amendment rights do not necessarily render the penalty unconstitutional. In *Arcara*, an adult bookstore was closed down because prostitution had been conducted repeatedly on its premises. The defendant argued that such a penalty effected prior restraints, but Chief Justice Burger, writing for the majority, observed that the defendant was free to run an adult bookstore at any other location and that the closure was

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[4] It is not entirely clear from the Complaint and opposition papers whether Adult Video is alleging that the Bail and Sentencing Acts constitute prior restraints. However, if such is alleged, the cause of action is hereby dismissed. Harsh penalties and bail provisions which potentially prevent individuals from engaging in free speech do not constitute prior restraints in violation of the First Amendment. If prior restraints could be considered activated against *persons* without reference to any specific materials or speech activities, then prison sentences could never be administered since every individual has the right to engage in free speech.

aimed only at thwarting the continued use of the defendant's premises for prostitution. In response to *Arcara*, Adult Video relies on *Near v. Minnesota*, 283 U.S. 697 (1931), for the proposition that past speech offenses cannot justify restraints on future speech. While Adult Video is essentially correct as to the holding of *Near*, that proposition of law is not dispositive in this instance.

In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court determined that statutes which incidentally infringe First Amendment rights may be unconstitutional if they aim at regulating activities which combine "speech" and "nonspeech" elements in the same course of conduct. 391 U.S. at 376. If the regulated activity does incorporate speech and nonspeech elements, then a four-pronged test is applied to determine the ultimate constitutionality of the challenged statute.

Obscenity, however, does not incorporate speech and nonspeech elements as envisioned by the *O'Brien* Court. In *O'Brien*, the plaintiff burned his draft card, an illegal activity which the Supreme Court nevertheless recognized as a form of political expression. Implicit in *O'Brien* is that, but for the Government's compelling interest in overseeing conscription, the political statement inherent in burning a draft card would be protected by the First Amendment. In contrast, obscenity is not protected speech. *Miller v. California*, 413 U.S. 15 (1973). As a result, the four-pronged *O'Brien* test is not applicable. *Arcara* is the appropriate analogy: the statute at issue here imposes subsequent punishment as opposed to prior restraint. The Court must therefore dismiss Adult Video's claim that RICO's post-trial forfeiture provisions violate the First Amendment.

B. 18 U.S.C. § 1963(d).

In *Fort Wayne Books* the Supreme Court reversed as unconstitutional a pretrial seizure order which was based on probable cause and authorized by Indiana's Civil Remedies for Racketeering Activity statute. The order had provided for the seizure of all of the defendants' property which was potentially forfeitable after a trial on the merits. Most notably, the defendants' bookstores were padlocked and their businesses could not continue to operate. In its opinion the Supreme Court stressed the fundamental maxim that "rigorous procedural safeguards must be employed before expressive materials can be seized as 'obscene.' " *Fort Wayne Books*, 109 S.Ct. at 927; *see also Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). The Supreme Court specifically emphasized that probable cause is insufficient grounds for seizure of presumptively protected speech materials. Indeed, only after a valid judgment is entered that specific materials are unprotected by the First Amendment may such materials be confiscated.

Section 1963(d) of the federal RICO statute provides, in pertinent part, that district courts may "enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section" prior to a trial on the merits. Adult Video argues that this provision is substantively indistinguishable from the Indiana provision which authorized the order stricken by the Supreme Court in *Fort Wayne Books*. The Court does not agree.

Section 1963(d) does not specifically authorize pretrial *seizure* of materials subject to forfeiture. Rather, the statute on its face merely authorizes various forms of judicially approved restraints designed to ensure that potentially forfeitable materials will not be dissipated or destroyed prior to trial. Furthermore, after *Fort Wayne Books* no district court judge can constitutionally order pretrial seizure of presumptively protected materials. Thus § 1963(d) does not authorize unconstitutional pretrial seizures and for this reason the claim for relief under § 1963(d) must be dismissed.

B. 18 U.S.C. § 1964.

Among the civil sanctions authorized by RICO is a provision that district courts may issue orders "imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in. . . . " Adult Video argues that this provision authorizes prior restraints in violation of the First Amendment, and the Court finds potential merit in this argument.

Individuals may not be enjoined from engaging in future, presumptively protected speech activities because of prior speech offenses they have committed. *Near v. Minnesota,* 283 U.S. 697 (1931). Thornburgh argues that RICO on its face authorizes only *"reasonable"* restraints and that district courts should be trusted not to issue orders which violate the First Amendment. In this case, however, the mere inclusion of the word "reasonable" in the statute may not save it from facial invalidity. The

statute provides district courts with *express* authority to effect apparently unconstitutional prior restraints on future speech. As a result, Adult Video's claim that 18 U.S.C. § 1964 is unconstitutional withstands a motion to dismiss.

IT IS SO ORDERED.

DATED: August 16, 1989

/s/ Ronald S. W. Lew
RONALD S. W. LEW
United States District Judge

CV 87-7894-RSWL, *Adult Video Association et al. v. Richard Thornburgh,* Defendant's Motion to Dismiss the entire First Amended Complaint.

APPENDIX B

JOHN H. WESTON,
G. RANDALL GARROU and
CLYDE F. DeWITT,
Members of
WESTON & SARNO
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(213) 550-7460

Attorneys for all Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ADULT VIDEO ASSOCIATION, a California Corporation, et al., Plaintiffs, v. RICHARD THORNBURGH, in his official capacity only as Attorney General of the United States, Defendant.	NO. CV 87-7894 RSWL (Jrx) (Filed Jan. 29, 1990) VOLUNTARY DISMISSAL BY STIPULATION ONLY AS TO THOSE CLAIMS NOT ALREADY DISMISSED AND ORDER [FRCP 41(a)(1)(ii)]

TO THE HONORABLE JUDGE OF SAID COURT:

IT IS HEREBY STIPULATED BY ALL PARTIES TO THE ABOVE-CAPTIONED MATTER:

1. Plaintiffs have brought an action challenging numerous aspects of the Racketeer Influenced and Corrupt Organizations Act ("RICO") as applied to predicate conduct in violation of state and federal obscenity laws.

2. The only defendant in the case, the Attorney General of the United States (originally Edwin Meese, III, now Richard Thornburgh) filed a motion to dismiss the entire Complaint pursuant to FRCP 12(b)(6).

3. On August 18, 1989, this Court filed an Order (entered in August 21, 1989) dismissing many of Plaintiffs' claims. However, in Pages 15 and 16 of that Order, the Court declined to dismiss a portion of Plaintiffs' Complaint involving 18 U.S.C. § 1964.

4. On December 19, 1989, Plaintiffs submitted a Motion for Summary Judgment as to that claim not dismissed by the Court's August 18, 1989 Order.

5. On January 8, 1990, the defendant submitted a Cross-Motion for Summary Judgment addressing the same issue, the only one remaining in the case.

6. Both motions are scheduled for hearing on February 5, 1990.

7. On January 9, 1990, the United States Supreme Court decided *FW/PBS, Inc., et al., v. City of Dallas, et al.*, ___ U.S. ___, No. 87-2012 (January 9, 1990).

8. Plaintiffs believe that the opinion does not affect the merits of the constitutional challenge to 18 U.S.C. § 1964. They agree, however, that under FW/PBS they lack standing at this time to challenge the constitutional validity of § 1964, because it has not been invoked to their detriment.

9. Accordingly, Plaintiffs seek dismissal by stipulation of the portion of Plaintiffs' Complaint involving 18 U.S.C. § 1964 that was not disposed of by the Court's Order of August 18, 1989.

10. This Dismissal is with prejudice insofar as any Plaintiff in the future seeks to attack the facial validity of § 1964 in a posture similar to the instant challenge. However, this dismissal in no way precludes any plaintiff from challenging the constitutionality of § 1964 in the event the government brings an action against him under that section.

11. It is contemplated by the parties that, upon dismissal of the remaining claims, a final judgment will be entered, the effect of which will be to allow the plaintiffs to immediately appeal, challenging the Court's Order of August 18, 1989 to the extent that it dismissed Plaintiffs' claims. The parties contemplate that the claim not dismissed pursuant to that Order will be voluntarily dismissed and not subject to appellate review.

DATED: January 22, 1990

Respectfully submitted,

JOHN H. WESTON
WESTON & SARNO

By _____
JOHN H. WESTON

Attorneys for All Plaintiffs

Robert L. Brosio,
United States Attorney,
Frederick M. Brosio, Jr.
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By: _____
Stan Blumenfeld
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Telephone No.: (213) 894-2872

ORDER

It is so ordered.

Dated: ___

_____
U.S. District Court Judge

APPENDIX C

ADULT VIDEO ASSOCIATION, Doe, Inc., Roe, Inc., Paul Poe, Plaintiffs-Appellants.

v.

William BARR,* Attorney General of the United States, Defendant-Appellee.

No. 90-55252.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 6, 1991.

Decided March 12, 1992.

As Amended June 18, 1992.

Producer, distributor, retailer and consumer of sexually explicit videotapes filed an action seeking a declaration that federal Racketeer Influenced and Corrupt Organizations Act's (RICO) criminal provisions were facially unconstitutional when enforced against obscenity offenses. The United States District Court for the Central District of California, Ronald S.W. Lew, J., granted government's motion to dismiss for failure to state a claim, and plaintiffs appealed. The Court of appeals, Tang, Circuit Judge, held that: (1) plaintiff satisfied standing and ripeness requirements; (2) RICO provisions permitting pretrial preservation of assets for forfeiture were not facially unconstitutional in obscenity cases; (3) provision authorizing pretrial seizures of obscene materials was unconstitutional; and (4) posttrial provisions authorizing posttrial forfeiture were facially invalid to the extent they

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*Attorney General William Barr is substituted for Richard Thornburgh as defendant/appellee, pursuant to Fed.R.App.P. 43(c).

authorized forfeiture of interests or assets of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity.

Affirmed in part and reversed in part.

John H. Weston, G. Randall Garrou, Clyde F. DeWitt and Cathy E. Crosson, Weston, Sarno, Garrou & DeWitt, Beverly Hills, Cal., for plaintiffs-appellants.

Stan Blumenfeld, Asst. U.S. Atty., Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before: TANG, REINHARDT and WIGGINS, Circuit Judges.

TANG, Circuit Judge:

Adult Video Association, Doe, Inc., Roe, Inc., and Paul Poe filed an action seeking a declaration that the federal Racketeer Influenced and Corrupt Organizations Act's ("RICO") criminal provisions are facially unconstitutional when enforced against obscenity offenses. The district court granted the government's motion to dismiss for failure to state a claim. The plaintiffs appeal only the district court's dismissal of their First Amendment challenge to RICO's criminal provisions. We affirm in part and remand in part.

BACKGROUND

RICO, 18 U.S.C. §§ 1961-1968, imposes severe penalties on any person convicted of engaging in a pattern of racketeering activity. The penalties include prison terms of up to twenty years, substantial fines, and forfeiture of

> (1) any interest the [defendant] has acquired or maintained in violation of [RICO];
>
> (2) any –
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the [defendant] has established, operated, controlled, conducted, or participated in the conduct of in violation of [RICO]; and
>
> (3) any property constituting, or derived from, any proceeds which the [defendant] obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of [RICO].

18 U.S.C. § 1963(a). Forfeiture is mandatory upon conviction. *Id.*

The statute also permits the government to apply to a district court for a pre-trial order to preserve assets for forfeiture. 18 U.S.C. § 1963(d). Courts may authorize pretrial seizures of assets, issue restraining orders and injunctions, require the execution of performance bonds,

and "take any other action to preserve the availability of property . . . for forfeiture." 18 U.S.C. § 1963(d)(1).

A defendant is guilty of engaging in a pattern of racketeering activity if that person commits two or more acts of "racketeering activity." 18 U.S.C. § 1961(5). The statute includes a laundry list of racketeering activities, any one of which may serve as a predicate offense in a pattern of racketeering. 18 U.S.C. § 1961(1). In 1984, Congress added to the list of predicate offenses "any act . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year" and "any act which is indictable under" the federal obscenity laws, 18 U.S.C. §§ 1461-1465. 18 U.S.C. § 1961(1); *see also* Pub.L. No. 98-473, 98 Stat. 1837 (1984).

The appellants, Adult Video Association, Doe, Inc., Roe, Inc., and Paul Poe (collectively, "Adult Video") are a producer, distributor, retailer, and consumer of sexually explicit videotapes, respectively. They brought an action against the Attorney General of the United States challenging RICO's provisions as facially unconstitutional under the First, Fifth, and Eighth amendments to the federal Constitution.[1]

Adult Video's complaint asserts that RICO's authorization of pre-trial seizures and its comprehensive post-trial forfeiture provisions amount to unconstitutional

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[1] Adult Video presses only the First Amendment claim in this appeal. The original action also attacked RICO's civil remedies. 18 U.S.C. § 1964, as unconstitutional. Adult Video does not contest the constitutionality of RICO's civil remedies here.

prior restraints on speech. Adult Video also argues that the severe penalties RICO authorizes for as few as two obscenity violations, when combined with the inherent uncertainty of deciding what qualifies as obscenity, chills constitutionally protected erotic and sexually explicit speech. In support of its position, Adult Video cites the decision of Roe, Inc. not to rent or sell any sexually explicit videotapes and Roe, Inc.'s inability to obtain any non-explicit, erotic videotapes due to distributors' liability concerns. Adult Video also points to Paul Poe's asserted inability to rent or to buy sexually explicit videos for home viewing, because video stores fear that they will become the object of a racketeering prosecution.

The government moved under Fed.R.Civ.P. 12(b)(6) to dismiss Adult Video's action for failure to state a claim. In August 1989, the district court granted the motion with respect to every claim except the count challenging RICO's civil remedies. The court rejected Adult Video's argument that a First Amendment chill emanates from a combination of (i) the inherent ambiguities in the definition of obscenity, (ii) the lax scienter requirement for obscenity, and (iii) the severe punishments RICO authorizes.[2] The court characterized Adult Video's Argument as little more than "an artful attempt to bypass" the Supreme Court's definition of obscenity in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 87 L.Ed.2d 419 (1973).

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[2] Adult Video also included in this formula the stiff detention and sentencing provisions contained in the Bail Reform Act of 1984, 18 U.S.C. §§ 3142-43, 3147-48, and the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-98, as applied to obscenity prosecutions. Adult Video does not rely upon either of these statutes in its argument on appeal.

With respect to Adult Video's prior restraint argument, the district court held that RICO imposed "subsequent punishment," rather than a prior restraint, on defendants duly convicted of obscenity violations. Relying on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), the district court concluded that such subsequent punishment did not run afoul of the First Amendment.

Finally, the district court rejected the argument that section 1963(d)'s authorization of pre-trial seizures made the provision facially unconstitutional. The court acknowledged that the Supreme Court's opinion in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989), effectively foreclosed pre-trial seizures of allegedly obscene materials under RICO. The district court nonetheless found facial invalidation inappropriate because section 1963(d) authorizes a variety of other pre-trial measures the facial constitutionality of which Adult Video does not question.

In January 1990, Adult Video filed a motion for voluntary dismissal of its only remaining claim (the constitutionality of RICO's civil remedies). The district court granted the motion and entered a final judgment on January 25, 1990.

Adult Video subsequently filed a timely notice of appeal to this court.

DISCUSSION

I. *Standard of Review*

We review the district court's dismissal of the complaint for failure to state a claim de novo. *Hartford Accident & Indem. Co. v. Continental Nat'l Am. Ins. Cos.*, 861 F.2d 1184, 1185 (9th Cir.1988). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir.1985), *cert. denied*, 474 U.S. 1056, 106 S.Ct. 795, 88 L.Ed.2d 773 (1986). We limit our review to the contents of the complaint and construe all allegations of material fact in the light most favorable to Adult Video. *Id.*

II. *Standing and Ripeness*

While the parties do not contest Adult Video's standing, we have an independent obligation to verify its authority to adjudicate this case. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31, 110 S.Ct. 596, 607-08, 107 L.Ed.2d 603 (1990). Because the federal government is not prosecuting Adult Video under RICO, Adult Video must show "a 'reasonable threat of prosecution for conduct allegedly protected by the Constitution.' " *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir. 1987) (quoting *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 625 n. 1, 106 S.Ct. 2718, 2721-22 n. 1, 91 L.Ed.2d 512 (1986)); *see also Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989).

Adult Video passes this test. Each of the parties alleges that it either produces, distributes, sells, or consumes erotic video-tapes and that its activities either could subject it to RICO prosecution or are chilled by the threat of such prosecution. The government's active enforcement of RICO's obscenity provision against other videotape distributors[3] demonstrates that the threat of prosecution is real. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 642-43, 98 L.Ed.2d 782 (1988).

While Adult Video does face a reasonable threat of prosecution, its complaint challenges more than the constitutionality of RICO obscenity prosecutions in and of themselves. Adult Video also objects to the seizures that may occur prior to prosecution and to the penalties that automatically follow a conviction. Consequently, our standing query must proceed one step further and determine whether Adult Video faces a reasonable threat of pre-trial seizure or post-conviction forfeiture. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303, 99 S.Ct. 2301, 2311, 60 L.Ed.2d 895 (1979).

Nothing in the record before us indicates that the Department of Justice has conducted pre-trial seizures in RICO obscenity cases. *See Fort Wayne Books*, 489 U.S. at 67 n. 13, 109 S.Ct. at 929-30 n. 13 (noting that the United States asserted in its 1988 *amicus curiae* brief that it did not engage in such activity). The statute nevertheless authorizes such seizures. In addition, no formal policy of

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[3] *See, e.g., United States v. Pryba*, 900 F.2d 748 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990).

the Department of Justice prohibits its prosecutors or officers from pursuing pre-trial seizures, and enforcement practices may change at any time in any case. Consequently, Adult Video's apprehension concerning pre-trial seizure is reasonable. Therefore, Adult Video does have standing to litigate this claim.

Likewise, because RICO mandates forfeiture upon conviction and expressly defines its scope, leaving district courts no discretion to limit it, we hold that the reasonable threat of prosecution confronting Adult Video necessarily entails a reasonable threat of post-trial forfeiture. *See Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 633-34 (7th Cir.) (court entertains pre-enforcement challenge to post-conviction forfeiture provision), *cert. denied*, ___ U.S. ___, 111 S.Ct. 387, 112 L.Ed.2d 398 (1990); *cf. Babbitt*, 442 U.S. at 303, 99 S.Ct. at 2311 (challenge to vagueness of criminal penalty provision). Adult Video thus has standing to challenge the post-trial forfeiture provision as unconstitutional.

With respect to the argument of an unconstitutional chill, Adult Video has alleged an actual injury. It alleges an immediate and tangible chill on distribution, as well as on a consumer's and a retailer's ability to obtain erotic and sexually explicit videotapes. "To the extent the provisions require [Adult Video] and similarly situated businesses to exercise self-censorship, they are required to exercise self-censorship today." *Sequoia Books*, 901 F.2d at 634; *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n. 6, 83 S.Ct. 631, 636 n. 6, 9 L.Ed.2d 584 (1963) (standing exists if governmental action impairs sales by the plaintiffs of arguably protected materials).

The absence of an active prosecution against Adult Video also raises the question of ripeness. Our conclusion that a reasonable threat of prosecution exists, for purposes of standing, effectively dispenses with any ripeness problem. The threat of a pre-trial (indeed, pre-prosecution) seizure may be reasonably discerned from the statute's text and the government's practices in other RICO cases.

Adult Video's objections to the post-trial remedy of forfeiture are also ripe. Adult Video's fear of forfeiture is reasonable and is alleged currently to have a concrete impact on Adult Video's exercise of its First Amendment rights. *See Babbitt*, 442 U.S. at 303, 99 S.Ct. at 2311.[4]

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[4] Since *Babbitt*, at least four Justices have expressed the view that "it does not follow that a challenge to whatever *remedy* might ultimately be fashioned (should liability be established and relief ordered) is ripe merely upon a showing of a 'reasonable threat' that proceedings will commence." *Ohio Civil Rights*, 477 U.S. at 633 n. 4, 106 S.Ct. at 2726 n. 4 (Stevens, J., concurring) (original emphasis); *see also Fort Wayne Books*, 489 U.S. at 60, 109 S.Ct. at 926 (challenge to state RICO civil forfeiture not ripe because "[t]hese claims can only be reviewed when (or if) such remedies are enforced against petitioner"). These cases are distinguishable, though, because the only uncertainty in this case is whether prosecution will result. The federal RICO statute prescribes the penalty that district courts *must* impose. Justice Stevens' concurrence spoke to a situation where the adjudicative body had the authority to tailor its remedies to avoid a constitutional violation. *See Ohio Civil Rights*, 477 U.S. at 633 n. 4, 106 S.Ct. at 2726 n. 4. Likewise, the pursuit of civil forfeiture in addition to criminal penalties under Indiana's RICO statute is optional for prosecutors. *See Fort Wayne Books*, 489 U.S. at 60, 109 S.Ct. at 926.

III. *Unconstitutional Chill*

Adult Video contends that the combination of RICO's severe penalty provisions, the nebulous definition of obscenity, and the absence of a rigorous scienter requirement for obscenity offenses hangs like a Sword of Damocles over those engaged in sexually explicit speech, unconstitutionally chilling protected communication.

Adult Video's concerns about the fragility of sexually explicit speech and the likely consequences of its entanglement in this regulatory web have great practical appeal. The Supreme Court, however, has already rejected an essentially identical argument in *Fort Wayne Books*. There the Supreme Court found unpersuasive the bookstore operators' contention that the inherent vagueness of *Miller*'s obscenity standard and the draconian penalties attaching to a RICO conviction in Indiana transgressed the First Amendment. The Court characterized the vagueness argument as "nothing less than an invitation to overturn *Miller* – an invitation that we reject." 489 U.S. at 57, 109 S.Ct. at 924; *see also Alexander v. Thornburgh*, 943 F.2d 825, 832 (8th Cir.1991).

Here, as in *Fort Wayne Books*, the RICO statute simply incorporates the state and federal obscenity laws – laws which Adult Video does not contend violate *Miller*'s constitutional limitations on the definition of obscenity. Whatever vagueness or indefiniteness plagues these statutes is, as long as *Miller* remains good law, constitutionally tolerable. Transporting these laws into RICO does not exacerbate the haziness of the obscenity definition. It simply alters the format for prosecuting repeated

violations of the obscenity laws. *See Fort Wayne Books*, 489 U.S. at 58, 109 S.Ct. at 925 ("Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either."); *Alexander v. Thornburgh*, 713 F.Supp. 1278, 1291 & n. 7 (D.Minn.), *appeal dismissed*, 881 F.2d 1081 (8th Cir.1989).

The Supreme Court also dismissed the bookstore operators' objections to Indiana's stiff RICO penalties by declaring any additional deterrent effect on protected speech to be the inevitable consequence of the criminal law's legitimate efforts to deter and to punish obscenity:

> It may be true that the stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means – as petitioner suggests – that some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene."

Id. 489 U.S. at 60, 109 S.Ct. at 925-26 (quoting *Smith v. California*, 361 U.S. 147, 154-55, S.Ct. 215, 219, 4 L.Ed.2d 205 (1959)) (citation omitted); *see also Sequoia Books*, 901 F.2d at 637 ("The *in terrorem* effects of which Sequoia

complains are simply the intended by-product of a legislative decision to punish those who deal in obscene materials and to make that business more costly."); *United States v. Pryba*, 900 F.2d 748, 756 (4th Cir.) (chill caused by RICO penalties does not violate the First Amendment because "[t]he fact that a person does some business disseminating protected materials cannot immunize that person from [penalties] that may be imposed for violation of criminal law") (quotation omitted), *cert. denied*, ___ U.S. ___, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990); *Polykoff*, 816 F.2d at 1340 n. 9.

Fort Wayne Books is thus dispositive of Adult Video's unconstitutional chill argument.

IV. *Unconstitutional Overbreadth*

Adult Video argues that RICO, as applied to obscenity, is subject to facial invalidation for overbreadth. Specifically, Adult Video contends that the penalty provisions impermissibly stifle constitutionally-protected sexually explicit speech. Enforcement of RICO in the obscenity context, Adult Video continues, can never legitimately occur because any consequent forfeiture would represent an unconstitutional prior restraint.

The overbreadth doctrine constitutes an exception to the general rule requiring the constitutionality of a statute to be tested against the conduct of the party before the court. It permits a party to challenge a law, not on the ground that the statute is unconstitutional as enforced against it, but rather on the ground that the statute's application to third persons not before the court violates

the First Amendment. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 & n. 17, 104 S.Ct. 2118, 2125 & n. 17, 80 L.Ed.2d 772 (1984); *see also New York v. Ferber*, 458 U.S. 747, 768-69, 102 S.Ct. 3348, 3360-61, 73 L.Ed.2d 1113 (1982).

> [T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Taxpayers for Vincent, 466 U.S. at 799 n. 17, 104 S.Ct. at 2125 n. 17 (quotations and citations omitted). In order to prevail, the plaintiff must demonstrate "substantial" overbreadth, " 'judged in relation to the statute's plainly legitimate sweep.' " *Taxpayers for Vincent*, 466 U.S. at 799-800, 104 S.Ct. at 2126 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2918, 37 L.Ed.2d 830 (1973)).

In light of these precedents, we reject Adult Video's overbreadth challenge. Adult Video's argument is little more than an amalgam of its unconstitutional prior restraint and chill arguments. Adult Video has not demonstrated the type of showing necessary to maintain an overbreadth challenge on First Amendment grounds. Adult Video's overbreadth theory simply mirrors the constitutional arguments it makes concerning the RICO

obscenity provisions' effects on its own ability to produce, distribute, sell, and consume sexually explicit videotapes.

In *Taxpayers for Vincent*, the Supreme Court rebuffed an overbreadth argument on precisely this ground:

> This is not . . . an appropriate case to entertain a facial challenge based on overbreadth. For we have found nothing in the record to indicate that the ordinance will have any different impact on any third parties' interests in free speech than it has on [plaintiffs].
>
> . . . [Plaintiffs] have, in short, failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to [them]. . . . [Plaintiffs] have simply failed to demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court.

Id. at 801-02, 104 S.Ct. at 2127.

V. *RICO's Pre-Trial Seizure and Post-Trial Forfeiture Provisions*

A. Pre-Trial Seizures

Adult Video contends that RICO's section 1963(d) is facially unconstitutional because it permits the pre-trial seizure of videotapes based only on a finding of probable cause to believe they are obscene.

The Supreme Court's recent opinion in *Fort Wayne Books* leaves little room for argument over the unconstitutionality of pre-trial seizures of allegedly obscene materials. Indeed, the government foregoes any such argument here. The Supreme Court held in *Fort Wayne Books* that pre-trial seizures of allegedly obscene books and films pursuant to Indiana's RICO statute violated the First Amendment. "[P]robable cause to believe that there are valid grounds for seizure," the Court explained, "is insufficient to interrupt the sale of presumptively protected books and films." 489 U.S. at 66, 109 S.Ct. at 929.

This holding translates readily to the federal RICO context. Indeed, the Supreme Court noted that Indiana's RICO statute was "similar" to the federal racketeering law. *Fort Wayne Books,* 489 U.S. at 67 n. 13, 109 S.Ct. at 930 n. 13. Federal RICO also permits pre-trial seizures upon a showing of probable cause. Thus the Supreme Court's concern that films not be removed from circulation prior to "[a] determination that the seized items [are] 'obscene' or that a RICO violation *has occurred*" applies with equal vigor in this instance. *Id.* at 66, 109 S.Ct. at 929 (original emphasis). The First Amendment will not tolerate such seizures until the government's reasons for seizure weather the crucible of an adversary hearing. *Id.* at 67, 109 S.Ct. at 929 ("[W]here the RICO violation claimed is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing

books or other publications is properly established in an adversary proceeding.") (footnote omitted).[5]

Because the reasoning of *Fort Wayne Books* is equally applicable to the federal RICO statute, we hold that the portion of section 1963(d) that authorizes pre-trial seizures is unconstitutional on its face.[6] We therefore reverse on this issue and direct the district court to enter judgment for Adult Video.

B. Post-Trial Forfeiture

Adult Video argues that RICO's post-trial forfeiture penalty constitutes an unlawful prior restraint because, by seizing assets beyond those adjudged obscene, it exacts as a toll for past transgressions the defendant's ability to communicate in the future. While we decline to equate these forfeitures with prior restraints, we also conclude that some tailoring of the scope of forfeiture is necessary to harmonize RICO's post-trial forfeiture penalty with the First Amendment.

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[5] The Supreme Court's concerns about premature seizure of expressive material operate even more forcefully in this case. Under Indiana's law, the defendant had already been convicted of the predicate RICO offenses, so the seizures were based upon both a history of obscenity convictions as well as probable cause. *Fort Wayne Books*, 489 U.S. at 66, 109 S.Ct. at 929. Under the federal RICO statute, the predicate offenses need not be established prior to trial.

[6] Because Adult Video does not challenge the other pre-trial procedures authorized by section 1963(d), we need not address their constitutionality.

1. Prior Restraint

Because a RICO forfeiture occurs only after a criminal trial on the obscenity issue, with its full panoply of procedural protections, the forfeiture represents punishment for engaging in obscenity rather than a prior restraint. "There is a historical distinction between prior restraints and criminal penalties in the first amendment setting, which has both practical consequences and a theoretical basis." *Polykoff*, 816 F.2d at 1337.

The primary concern animating the Supreme Court's prior restraint jurisprudence has been to prevent the government from seizing materials or otherwise halting speech prior to a determination that the speech is actually harmful. *See, e.g., Fort Wayne Books*, 489 U.S. at 66-67, 109 S.Ct. at 929-30 (seizure inappropriate because effected prior to a judicial determination of obscenity); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316-17, 100 S.Ct. 1156, 1161-62, 63 L.Ed.2d 413 (1980) (per curiam) (prior restraint unconstitutional because speech not yet adjudged unlawful); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210, 84 S.Ct. 1723, 1725-26, 12 L.Ed.2d 809 (1964) (warrant for seizure unconstitutional because not preceded by a hearing on obscenity); *Marcus v. Search Warrant of Property at 104 E. Tenth St.*, 367 U.S. 717, 731, 81 S.Ct. 1708, 1715-16, 6 L.Ed.2d 1127 (1961) (warrants to seize alleged obscenity unconstitutional because of inadequate procedural safeguards); *cf. Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 444-45, 77 S.Ct. 1325, 1329-30, 1 L.Ed.2d 1469 (1957) (seizure after determination of obscenity in a criminal trial does not violate the First Amendment). The Court's constant refrain has been that

it is better to punish harmful speech after it occurs than to smother it at birth. *See, e.g., Vance,* 445 U.S. at 316 n. 13, 100 S.Ct. at 1161 n. 13 ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.") (original emphasis); *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 714-15, 51 S.Ct. 625, 630-31, 75 L.Ed. 1357 (1931).

The prior restraint cases do not stand for the proposition that harmful speech can never be punished. To the contrary, case law expressly permits punishment so long as the process for determining the appropriateness of sanctions "embod[ies] the most rigorous procedural safeguards" and is "ringed about with adequate bulwarks." *Bantam Books,* 372 U.S. at 66, 83 S.Ct. at 637. The protections contained in a criminal RICO prosecution – such as the allocation of the burden of proof, a heightened standard of proof, and adversariness – satisfy *Bantam's* command.

In *Kingsley Books,* the Supreme Court sustained a New York statute permitting the seizure of obscene books and an order enjoining the defendant from further distribution of such books because, unlike the prior restraint cases, a court imposed these penalties only after the books had been adjudged obscene in a criminal trial. 354 U.S. at 445, 77 S.Ct. at 1330 ("Unlike *Near [v. Minnesota],* [the New York Law] is concerned solely with obscenity and . . . studiously withholds restraint upon matters not already published and not yet found to be offensive."); *see also Bantam Books,* 372 U.S. at 70, 83 S.Ct. at 639 ("Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial

hedged about with the procedural safeguards of the criminal process.").

RICO likewise postpones forfeiture until a judicial determination of obscenity is made after a criminal trial.[7] Only at this point does RICO permit "the seizure . . . of the instruments of ascertained wrongdoing." *Kingsley Books*, 354 U.S. at 444, 77 S.Ct. at 1329; *see also Sequoia Books*, 901 F.2d at 636 (post-trial forfeiture under Illinois obscenity statute does not violate the First Amendment because "Illinois does not attempt here to regulate the sale of protected reading materials or to close bookstores. It merely punishes past obscenity convictions."); *Western Business Sys., Inc. v. Slaton*, 492 F.Supp. 513, 514 (N.D.Ga.1980) (post-trial forfeiture under Georgia's RICO statute does not entrench upon free speech rights).

The purpose of the forfeiture is to strip the defendant of the tools and profits of criminal conduct and thereby to terminate the illegal enterprise. Thus, unlike prior restraints, it is the defendant's unlawful commercial conduct (dealing in obscenity) rather than the defendant's anticipated speech that sets into motion a RICO forfeiture. In *Arcara*, 478 U.S. at 705-07, 106 S.Ct. at 3177-78, the Supreme Court upheld an order of closure of an adult bookstore. It refused to equate the closure with a prior restraint in part because, as with RICO, non-expressive conduct (prostitution on the premises), rather than speech, prompted the closure. *Id.* at 705 n. 2, 106 S.Ct. at 3177 n. 2; *see also Pryba*, 900 F.2d at 755.

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[7] As noted earlier, we have no occasion to address the facial constitutionality of RICO's civil forfeiture provision, 18 U.S.C. 1964, in this case.

Also like the orders sustained in *Arcara* and *Kingsley Books,* RICO forfeiture does not silence the defendant. Forfeiture simply precludes the defendant from using assets derived from the obscenity trade to subsidize future speech. *See Arcara,* 478 U.S. at 706 n. 2, 106 S.Ct. at 3177 n. 2 (order "impose[s] no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location"); *511 Detroit St., Inc. v. Kelley,* 807 F.2d 1293, 1299 (6th Cir.1986) (heavy fines imposed under Michigan's anti-obscenity law do not constitute prior restraints because "there is no prospective legal restraint on any expression, obscene or protected, that [defendants] . . . may choose to undertake"), *cert. denied,* 482 U.S. 928, 107 S.Ct. 3211, 96 L.Ed.2d 698 (1987). A forfeiture is not a gag order. RICO defendants do not risk contempt if they revive that portion of their business dealing in sexually explicit and erotic videotapes after conviction. Defendants simply have no First Amendment right to use the profits and proceeds from trafficking in obscenity to finance their constitutionally protected speech. We agree with the Fourth Circuit that "defendants may not launder their money derived from racketeering activities by investing it in bookstores, videos, magazines and other publications. The First Amendment may be used as a shield, but it is not a shield against criminal activity." *Pryba,* 900 F.2d at 755.

2. Scope of Forfeiture

Although we will not characterize RICO forfeiture as a prior restraint, we do consider it necessary to tailor the

scope of the forfeiture permitted by statute to alleviate constitutional concerns about curtailing legitimate speech in the name of fighting obscenity. While the authorization of a forfeiture does not by itself render the RICO statute unconstitutional, to the extent section 1963 mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense, the statute is unconstitutional on its face.

As noted earlier, the scope of RICO forfeiture is extremely broad, reaching nearly every asset remotely connected with the offense. "[F]orfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest in the enterprise." *United States v. Busher,* 817 F.2d 1409, 1413 (9th Cir.1987). We have already observed that "RICO's breadth and inflexibility counsel[] caution, for no penalty is per se constitutional." *Id.* at 1414 (quotation omitted); *cf. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,* ___ U.S. ___, 112 S.Ct. 501, 511-12, 116 L.Ed.2d 476 (1991) (statute designed to deprive convicted criminals of profits and proceeds from publicizing their crimes not sufficiently tailored to survive First Amendment scrutiny).

For purposes of comparison, a number of other obscenity statutes contain markedly less drastic forfeiture provisions than federal RICO does. Illinois's obscenity statute permits forfeiture only of the direct and indirect proceeds of obscenity violations and the assets used wholly or in part to subsidize the actual criminal conduct. *See Sequoia Books,* 901 F.2d at 632; *see also id.* at 637-38 (comparing the scope of forfeiture permitted by Illinois

law and by federal RICO). The federal Child Protection and Obscenity Enforcement Act likewise limits forfeitures to (i) the obscene materials themselves, (ii) property constituting or traceable to the gross profits or proceeds obtained from the offense, and (iii) property actually used or intended to be used to commit or to promote the offense. 18 U.S.C. §§ 1466(a), 2253(a); *cf. Fort Wayne Books*, 489 U.S. at 65, 109 S.Ct. at 928 ("[W]e assume without deciding that bookstores and their contents are forfeitable . . . when it is proved that these items are property *actually used in, or derived from,* a pattern of violations of . . . obscenity laws.") (emphasis added).[8]

The Supreme Court, in the past, has recognized the need to tailor criminal rules narrowly and carefully when they seek to operate within the First Amendment arena. "Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith*, 361 U.S. at 150-51, 80 S.Ct. at 217 (citing examples); *see also Simon & Schuster*, 112 S.Ct. at 512 (New York's "Son of Sam" law held to be "inconsistent with the First Amendment" because not narrowly tailored to achieve goal of compensating victims from the fruits of the crime); *Quantity of Books*, 378 U.S. at 211-12,

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[8] Indiana's RICO statute requires forfeiture only of property "used in the course of, intended for use in the course of, derived from, or realized through" the racketeering activity. *Fort Wayne Books*, 489 U.S. at 51, 109 S.Ct. at 921.

84 S.Ct. at 1726-27 (state may not treat ordinary contraband and obscene books the same for purposes of seizure because of the First Amendment concerns infusing the latter); *accord Speiser v. Randall,* 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958) ("The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . . ")

In light of these precedents, the current breadth of RICO's forfeiture provision cannot pass constitutional muster. At the very least, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited. As in *Busher,* district courts should not, absent exceptional circumstances, "order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO [obscenity] violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income." 817 F.2d at 1415-16. Because Adult Video raises only a facial attack, we leave for the district courts the specific formulation of RICO forfeiture orders that are consistent with the First Amendment, in light of the particular facts presented in individual cases. *Cf. id.*

The government no doubt believes that diminishing the scope of RICO forfeiture in this manner will dilute the statute's deterrent effect and risk a resurrection of the criminal enterprise. While these are important concerns, the incremental contribution that RICO's current sweeping forfeiture provisions make to the deterrence and destruction of criminal enterprises over what would be

accomplished under a narrower definition of forfeitable assets does not justify the additional curtailment of constitutionally protected, sexually explicit speech. *See Simon & Schuster,* 112 S.Ct. at 509 ("[W]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.") (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 592, 103 S.Ct. 1365, 1376, 75 L.Ed.2d 295 (1983)). Tailoring the scope of forfeiture acknowledges that in obscenity cases, unlike traditional RICO prosecutions, a countervailing concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech demands a more delicate approach to forfeitures. *See Marcus,* 367 U.S. at 736, 81 S.Ct. at 1719 (expressing concern for the "public's opportunity to obtain . . . publications" because the state's obscenity seizure law deterred the sale and distribution of speech falling under the First Amendment's aegis). The forfeiture of assets derived from drugs, arson, fraud, and murder rarely, if ever, implicates a public right of access to information. The forfeiture of assets loosely affiliated with obscenity offenses, by contrast, hurts not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic video tapes. Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Id.* at 731, 81 S.Ct. at 1716; *see also Smith,* 361 U.S. at 154, 80 S.Ct. 215, 219 (strict liability provision in obscenity statute unconstitutional because it would "restrict the public's access to forms of the printed word

which the State could not constitutionally suppress directly").

In sum, we hold that RICO's provisions permitting the pre-trial preservation of assets for forfeiture are not facially unconstitutional in obscenity cases. Only that part of section 1963(d) that authorizes pre-trial seizures of obscene materials on the basis of probable cause is unconstitutional. Post-trial forfeitures do not, on their face, amount to prior restraints. We find it necessary, however, to tailor the scope of RICO forfeitures in obscenity cases in order to conform the statute to the dictates of the First Amendment. So delineated, RICO's post-trial forfeiture provisions are not facially unconstitutional.

CONCLUSION

James Madison observed that " '[s]ome degree if abuse is inseparable from the proper use of everything.' " *Near*, 283 U.S. at 718, 51 S.Ct. at 632 (quoting *Report on the Virginia Resolutions, Madison's Works*, vol. iv, 544). Speech perhaps more than any other constitutionally protected activity, offers a daily demonstration of the truth of Madison's words. The First Amendment, however, strictly regulates government's authority to punish expression in the name of curbing abuse. Our Constitution prefers to err on the side of protecting speech. "[I]t is better to leave a few of [speech's] noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." *Id.* (quoting *Report on the Virginia Resolutions, Madison's Works*, vol. iv, 544). RICO's scattershot method of criminal prosecution is ill-

suited to the delicate task of policing sexually explicit expression.

Although we hold that forfeiture provisions in general do not amount to unconstitutional prior restraints, the breadth of RICO's current forfeiture provision is incompatible with the First Amendment. Only those assets traceable to or substantially intertwined with the obscenity racketeering enterprise may be forfeited. Similarly, while we uphold section 1963(d)'s provision for the pre-trial preservation of assets, we invalidate that portion of the section that permits pre-trial seizures of obscenity merely on a showing of probable cause.

Adult Video has not made out a claim of overbreadth because it has not demonstrated that RICO impacts third parties' speech any differently than it does its own.

Finally, we reject Adult Video's unconstitutional chill argument, in light of the Supreme Court's disposition of a similar claim in *Fort Wayne Books*.

The decision of the district court is AFFIRMED IN PART and REVERSED IN PART. Each party to this appeal shall bear its own costs.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADULT VIDEO ASSOCIATION; DOE, INC.; ROE, INC.; PAUL POE, Plaintiffs-Appellants, vs. WILLIAM BARR,* ATTORNEY GENERAL OF THE UNITED STATES, Defendant-Appellee.	NO. 90-55252 D.C.# CV-87-7894-RSWL **ORDER DENYING PETITION FOR REHEARING** (Filed Jun. 15, 1992)

BEFORE: TANG, REINHARDT, and WIGGINS, Circuit Judges.

The panel has considered Appellants' Petition for Rehearing. The Petition for Rehearing is denied.

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*Attorney-General William Barr is substituted for Richard Thornburgh as defendant/appellee, pursuant to Fed. R. App. P. 43(c).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADULT VIDEO ASSOCIATION; DOE, INC.; ROE, INC.; PAUL POE, Plaintiffs-Appellants, vs. WILLIAM BARR,* ATTORNEY GENERAL OF THE UNITED STATES, Defendant-Appellee.	NO. 90-55252 D.C.# CV-87-7894-RSWL **ORDER** (Filed Jul. 7, 1992)

BEFORE: TANG, REINHARDT, and WIGGINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

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*Attorney General William Barr is substituted for Richard Thornburgh as defendant/appellee, pursuant to Fed. R. App. P. 43(c).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

Janet RENO, Attorney General of the United States, petitioner, v. ADULT VIDEO Association, et al.

No. 92-773.

Case below, *Adult Video Ass'n v. Barr*, 960 F.2d 781.

June 28, 1993. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Alexander v. United States*, 509 U.S. ___, 113 S.Ct. 2766, ___ L.Ed.2d ___ (1993).

APPENDIX F

ADULT VIDEO ASSOCIATION; Doe, Inc.; Roe, Inc.; Paul Poe, Plaintiffs-Appellants,

v.

Janet RENO,* Attorney General of the United States, Defendant-Appellee.

No. 90-55252.

United States Court of Appeals, Ninth Circuit.

Nov. 30, 1994.

Producer, distributor, retailer and consumer of sexually explicit video tapes filed action seeking declaration that the criminal penalty provision of the Racketeer Influenced and Corrupt Organizations Act were facially unconstitutional when enforced against obscenity offenses. Motion to dismiss was granted by the United States District Court for the Central District of California, Ronald S.W. Lew, J., and plaintiffs appealed. The Court of Appeals affirmed in part and reversed in part, 960 F.2d 781, and the government petitioned for certiorari. The Supreme Court, 113 S.Ct. 3028, vacated and remanded. On remand, the Court of Appeals held that: (1) RICO's posttrial forfeiture provisions do not constitute unconstitutional prior restraint when applied to assets invested in legitimate expressive activity, but (2) pretrial seizure provision violates the First Amendment.

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*Attorney General Janet Reno is substituted for William Barr as defendant/appellee, pursuant to Fed.R.App.P. 43(c).

Affirmed in part and reversed in part.

On Remand from the United States Supreme Court.

Before: TANG, REINHARDT, and WIGGINS, Circuit Judges.

Adult Video Association, Doe, Inc., Roe, Inc., and Paul Poe (collectively, "Adult Video") filed an action seeking a declaration that the federal Racketeer Influenced and Corrupt Organizations Act's ("RICO") criminal penalty provisions found under 18 U.S.C. § 1963 are facially unconstitutional when enforced against obscenity offenses. The district court granted the government's motion to dismiss for failure to state a claim. Adult Video appealed the district court's dismissal of its First Amendment challenge to RICO's criminal penalty provisions. We affirmed in part and reversed in part, holding that (1) Adult Video satisfied standing and ripeness requirements; (2) RICO's criminal penalty provisions were neither unconstitutionally chilling nor overbroad; (3) the provision authorizing pre-trial seizures of obscene materials was unconstitutional; and (4) the provisions authorizing post-trial forfeiture were facially invalid to the extent they authorized forfeiture of "those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity." *Adult Video Ass'n v. Barr*, 960 F.2d 781, 791 (9th Cir. 1992).

The government filed a petition for writ of certiorari, which was granted. *Reno v. Adult Video Ass'n*, ___ U.S. ___, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993). The Supreme Court vacated our judgment and remanded the case to us for

further consideration in light of *Alexander v. United States*, ___ U.S. ___, 118 S.Ct. 2766, 125 L.Ed.2d 441 (1993). *Id.* Upon further consideration, we conclude that parts I, II, III, IV, V(A) and V(B)(1) of our prior opinion's discussion section are either supported or unaffected by *Alexander* and, therefore, order that those parts be readopted in their entirety. However, we conclude that part V(B)(2) of our prior opinion's discussion section, as well as our conclusion section referencing RICO's post-trial criminal forfeiture provisions, is affected by *Alexander* and cannot be readopted.

In part V(B)(2), we expressed our concern that RICO's post-trial criminal forfeiture provisions, although not a prior restraint, raised constitutional concerns about curtailing legitimate speech in the name of fighting obscenity. *Adult Video Ass'n*, 960 F.2d at 790. We noted that the scope of those provisions "is extremely broad, reaching nearly every asset remotely connected with the offense," and held that to the extent that 18 U.S.C. § 1963 "mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense, the statute is unconstitutional on its face." *Id.* To that end, we concluded that "[a]t the very least, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited." *Id.* at 791. We further concluded that "district courts should not, absent exceptional circumstances, 'order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO [obscenity] violations not central to the conduct of the

business and resulting in relatively little illegal gain in proportion to its size and legitimate income.' " *Id.* (quoting *United States v. Busher*, 817 F.2d 1409, 1415-16 (9th Cir. 1987) (alteration in *Adult Video Ass'n*)).

In *Alexander*, however, the Supreme Court makes clear that the scope of RICO's post-trial criminal forfeiture provisions does not offend the First Amendment. It held that those provisions are a punishment for past criminal conduct, and that such a punishment is no more of a threat to the freedom of expression than a prison term or a large fine, both of which are clearly constitutional. *Alexander*, ___ U.S. at ___, 113 S.Ct. at 2774. Moreover, the Court noted that criminal sanctions "having some incidental effect on First Amendment activities are subject to First Amendment scrutiny 'only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity.' " *Id.* at ___, 113 S.Ct. at 2774-75 (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07, 106 S.Ct. 3172, 3177, 92 L.Ed.2d 568 (1986)). The Court found neither exception applicable to criminal forfeitures for racketeering committed through obscenity violations. *Id.* at ___, 113 S.Ct. at 2775.

Thus, pursuant to *Alexander*, our First Amendment concerns as to the scope of RICO's post-trial criminal forfeiture provisions are misplaced. *Alexander* instructs that our concerns, if they are constitutionally relevant at all, are relevant only to the Eighth Amendment's prohibition against excessive fines. *Id.* at ___, 113 S.Ct. at 2775-76.

As Adult Video appealed only the district court's dismissal of its First Amendment challenge to RICO's criminal penalty provisions, any discussion concerning the Eighth Amendment would be inappropriate. As such, our discussion must end with our holding that a forfeiture under RICO's post-trial criminal forfeiture provisions is not an unconstitutional prior restraint.[1] Thus, with respect to the post-trial criminal forfeiture claim, the judgment of the district court granting the government's motion to dismiss for failure to state a claim is affirmed.

We emphasize, however, that *Alexander* does not alter our holding that Adult Video has standing to challenge RICO's pre-trial seizure provision, and that the seizure provision violates the First Amendment. We therefore direct the district court to enter judgment for Adult Video on its claim that RICO's 1963(d) pre-trial seizure provision is unconstitutional on its face.

The decision of the district court, is AFFIRMED IN PART and REVERSED IN PART. Each party to this appeal shall bear its own costs.

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[1] We also order that our prior opinion's background section be readopted, as well as all of the conclusion section except for the section's reference to RICO's forfeiture provisions.